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ABSTRACT

Ratification by Australia of the United Nations Convention on the Rights of the Child in 1990 acted as a potent stimulus for a series of debates and controversies concerning the place of children in Australian society. The debate has largely taken place in relatively specialized forums involving lawyers, members of the judiciary, social philosophers, child advocates, and members of other interest groups. This book is designed to make the processes and outcomes of these debates accessible to a much broader audience. Contributors include some of Australia's foremost commentators on children's rights and child policy. Chapters are: (1) "Children's Rights: Setting the Scene" (Kathleen Funder); (2) "Reflections on Children's Rights" (Margaret M. Coady); (3) "Self, Self-Esteem and Sense of Place: An Australian Framework for Children's Rights Claims in the 1990s" (Moira Rayner); (4) "Children's Rights and Family Law" (John Faulks); (5) "Children's Rights in School Education" (Robert Ludbrook); (6) "The Child Protection and Welfare System" (Judy Cashmore and Sally Castell-McGregor); (7) "Kids, Cops, Lock Ups and the Convention on the Rights of the Child" (Danny Sandor); (8) "Medical Procedures for Children" (Loane Skene); and (9) "Income Support for Children and Young People" (Anthony King). Each chapter contains references. (LPP)

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Citizen Child

Australian Law and Children's Rights

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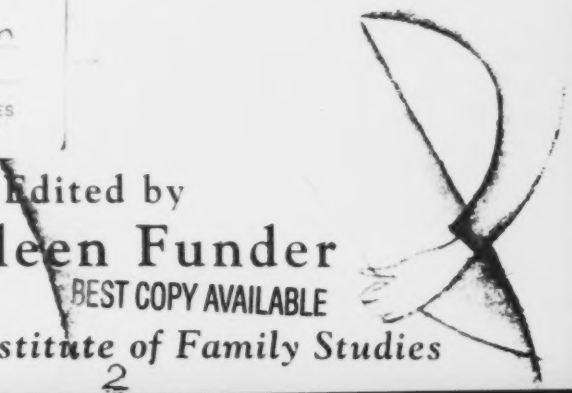

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Kathleen Funder

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Contents

Foreword xi
Contributors xiii

1 **Children's Rights: Setting the Scene** 1
Kathleen Funder

'Rights talk' and children 1
Points of departure 3
Informing debate 3
The collection 4
Caring and rights 10
References 10

2 **Reflections on Children's Rights** 11
Margaret M. Coady

Alternative views of rights 11
Legal and moral rights 13
Freedom rights versus welfare rights 15
Problems with welfare rights 17
The special case of children 18
Criteria for claiming a child's rights 19
Parents' rights 20
The public/private dichotomy 22
Liberalism and individualism 24
Further attacks on rights 26

The broad application of rights 27
References 30

3 **Self, Self-esteem and Sense of Place: an Australian Framework for Children's Rights Claims in the 1990s** 33
Moira Rayner

Family and children's rights in Australian law 34
International obligations 38
Enforceable Australian obligations 41
Children's rights as a benchmark 45
The right to an identity 49
Policy implications of the Convention on the Rights of the Child 51
Children as part of the community 52
References 53

4 **Children's Rights and Family Law** 55
John Faulks

An end to litigation? 57
Custody 58
Welfare of the child as paramount consideration 63
Access 68
Separate representation for children? 72
Should we keep the children out of it? 75
The welfare jurisdiction of the Family Court of Australia 76
Communicating family law 79
Where to now? 82
References 83

5 **Children's Rights in School Education** 84
Robert Ludbrook

Consumer rights in education 85
Children's rights in education 91
Legal bases of schools' powers 95
Limits of schools' powers over students 104
Conclusion 111
References 112

6 **The Child Protection and Welfare System** 113
Judy Cashmore and Sally Castell-McGregor

Children's rights and child welfare 114
Issues in reporting and investigation 116
Trends and issues in substitute care 123
Trends and themes in child protection and welfare 128
Should the children have a say? 133
The child's right to be heard 135
Accountability, confidentiality and public interest 138
Conclusion 141
References 143

7 **Kids, Cops, Lock Ups and the Convention on the Rights of the Child** 148
Danny Sandor

Suspects' rights in context 148
Human rights conventions 149
Australia and the Convention on the Rights of the Child 150
Rights in police custody 152

Improving compliance
Practice responses 173
Programmatic responses 174
Systemic responses 176
References 178
180

8 **Medical Procedures for Children**
Loane Skene **186**

Babies and young children
Parents cannot consent to some procedures 187
Child's 'best interests': limits on parental authority 190
Intervention by other interested adults 196
Older children: who consents? 202
Conclusion 202
References 212
214

9 **Income Support for Children and Young People**
Anthony King **216**

The scope of income support
Broad statements of rights 217
Program entitlements 218
Entitlements over the early years 221
The transition to independent incomes 222
The nature of the rights to income support 234
Enhancing rights to income support 245
References 253
255

Index
259

Tables

1 Maximum value of payments and means test thresholds for selected income support payments for children, Australia 1995 223

2 Maximum value of payments and means test thresholds for selected income support payments for young single people without dependants, August 1995 235

Foreword

Australia ratified the United Nations Convention on the Rights of the Child in 1990. Ratification acted as a potent stimulus for a series of debates and controversies, still ongoing, concerning the place of children in Australian society. Among issues of concern have been the extent to which the rights of children, as elaborated in the Convention, are already respected and protected in Australia, the degree of citizenship to be conferred upon children and the extent to which there is a need to amend Australian law and social policy as they relate to children, to ensure that Australian children benefit from the full fruits of the Convention.

By and large the debate has taken place in a range of relatively specialised forums involving child and family lawyers, members of the judiciary, social philosophers, child advocates and members of other interest groups. A number of publications have emerged out of the debate, but to a large degree these have been addressed to similar, rather specialist audiences.

Citizen Child has been designed to make the processes and outcomes of these debates accessible to a much broader audience. Edited by Dr Kathleen Funder, a senior member of the research staff of the Australian Institute of Family Studies, the volume comprises a series of seminal papers by a team of authors, all of whom are eminent specialists in their field but who have also been selected for their proven capacity to write clearly and informatively for a broad readership. The result is an integrated presentation of the key issues and dilemmas which the United Nations Charter raises about the rights of children and the relationships of these rights to the care, nurture and wellbeing of children in Australian society.

Citizen Child is particularly oriented towards the array of adult citizens of Australia whose life and work brings them into contact with children in ordinary, everyday settings – parents, teachers, paediatricians, general practitioners among others. The book exposes readers directly to the debate over the rights of children and, by encouraging refection on the range of legal, legislative, social and personal issues

involved, enhances awareness of assumptions we all make in our thinking, parenting, educating and working with children leading, perhaps, to challenge of these assumptions.

Citizen Child is the outcome of a collaboration between the Australian Institute of Family Studies and a group of Australia's leading thinkers on issues concerned with the rights of children. I commend it to all who are concerned, personally and professionally, to promote the wellbeing of our nation's children.

Harry McGurk
Director, Australian Institute of Family Studies

Contributors

Judy Cashmore has a PhD in psychology and is a Research Fellow at the Social Policy Research Centre, University of New South Wales, where she has been undertaking a longitudinal study of state wards leaving care. Over a period of more than ten years of research in the broad area of children's welfare and the law, she has worked as a consultant for the Australian Law Reform Commission, the New South Wales Child Protection Council, the National Child Protection Council, the Family Law Council and the New South Wales Department of Community Services. She is also a member of the New South Wales Child Protection Council Legal Committee and the New South Wales Office of the Department of Public Prosecutions Sexual Assault Review Committee.

Sally Castell-McGregor is the Executive Officer of Australia's only statutory children's rights organisation – the South Australia Children's Interests Bureau. She has had extensive practical experience in the field of residential care of children, juvenile justice, child protection and family law. She is the author and co-author of a number of publications concerned with child advocacy and children's rights, and is a Board member of the National Child Protection Council, the National Children's and Youth Law Centre, and the South Australia Child Health Council.

Margaret M. Coady is a Senior Lecturer in the Department of Early Childhood Studies at The University of Melbourne. In 1994–95 she spent a year as a Research Fellow at the University Centre for Human Values, Princeton University, during which she wrote the chapter for this book. Her academic publications include articles on children's rights, child abuse, and ethics in the professions. She has acted as consultant to a number of professional bodies on codes of ethics, and is currently editing a book on this topic.

John Faulks was appointed as a Judge of the Family Court of Australia in October 1994. He is a former president of the Law Council of Australia and of the Law Society of the Australian Capital Territory, and practised as a solicitor and barrister for more than 20 years prior to his appointment to the bench. At the time of writing, he was Chairman of the Family Law Council (an advisory body to the Federal Attorney General on matters of family law policy).

Kathleen Funder has a PhD in psychology and is a Principal Research Fellow at the Australian Institute of Family Studies. Her recent publications include *Images of Australian Families* (ed.) (Longman 1990) and *Settling Down: Pathways of Parents after Divorce* (co-authors M. Harrison and R. Weston) (AIFS 1993). A forthcoming book, *Remaking Families*, on the long-term adaptations of parents and children to divorce, will complete a trilogy on the consequences of divorce in Australia. She is currently conducting an evaluation of reforms to the *Family Law Act* concerning children and the responsibilities of parents.

Anthony King is a Senior Research Fellow at the National Centre for Social and Economic Modelling at the University of Canberra, where he is engaged in the development of simulation models to explore the distributional impacts of policy. At the time of writing, he was a Senior Research Fellow with the Social Policy Research Centre at the University of New South Wales. His experience in applied social and economic research has included a number of studies focusing on aspects of the Australian income support system, including research into the particular circumstances of children and young people.

Robert Ludbrook is a lawyer and Director of the National Children's and Youth Law Centre, based in Sydney, which provides free information, advice and advocacy for children and young people throughout Australia. Before taking up his present position, he worked with the Children's Legal Centre in London and the Youth Law Project in Auckland, New Zealand. He has represented children and young people before courts and tribunals, and is the author of a

number of books and articles on children's rights, education law, family law and adoption.

Moira Rayner is a lawyer and part-time Commissioner of the Human Rights and Equal Opportunity Commission. Formerly Chairperson of the Law Reform Commission of Western Australia and Victorian Commissioner for Equal Opportunity, her interest in the rights, status and legal representation of children include: former consultant to the Human Rights and Equal Opportunity Commission's Homeless Children Inquiry and member of the Child Sexual Abuse Taskforce (WA); former member of the Reproductive Technology Council (WA); former Acting Deputy Director, Research, Australian Institute of Family Studies; and current Chairperson of the National Children's and Youth Legal Centre (NSW). She has also written widely about the legal representation of children, child abuse, juvenile sentencing policy, child care and related issues.

Danny Sandor is legal Associate to the Chief Justice of the Family Court of Australia, and Convenor of the Juvenile Justice Working Group for the Youth Affairs Council of Victoria. After completing studies in psychology and criminology he worked between 1983 and 1988 as a practitioner, program manager and staff educator in services for young people in the criminal justice and protective services systems. With grants from the Criminology Research Council, he has conducted two major research projects: in 1989 an investigation of the experience of violence in the lives of homeless young people, with Dr Christine Alder; and in 1995, a study analysing the perceptions of young people and youth sector workers about new Victorian laws requiring the mandatory reporting of child and adolescent abuse, with Julian Bondy.

Loane Skene is Associate Professor and Director of Studies for the Graduate Diploma of Health and Medical Law in the Law School at The University of Melbourne. She spent ten years with the Victorian Law Reform Commission as a Principal Research Officer for its projects on Genetic Manipulation and Informed Decisions about Medical Procedures, and worked with a law reform commission in Canada.

Loane Skene is the author of *You, Your Doctor and the Law* (OUP 1990), the title on Medicine for *Halsbury's Laws of Australia* (in preparation), and numerous articles in Australian and overseas legal, medical and scientific journals. She is a member of the Federal Genetic Manipulation Advisory Committee, the Gene Therapy Committee of the National Health and Medical Research Council and a number of other medico-legal committees.

1
Children's Rights: Setting the Scene

Kathleen Funder

The provision of child and family services has long been debated within a framework of the respective spheres of responsibility of the family and the state (OECD 1990). At one end of the continuum, the state is considered to carry major responsibility for children because children are seen as an asset of society; investment in them reaps returns in future productivity and social integration. The view at the other end of the continuum is that children are a private choice and private pleasure, and thus the prime responsibility rests with parents for their nurture and support.

Of course these are artificial polarities, as any country with a public education system can demonstrate; some partnership is always involved in developing policies with respect to children. Along this imaginary line of public–private responsibility for children, Australia lies somewhere between European countries such as Sweden and France, where universal state support for children is a high priority, and the United States, where virtually no direct state support for children exists at all. In Australia, we have historically been wary of higher levels of state intervention, not just because of the costs implied, but because state support may imply greater public control of children than is generally considered tolerable. The education debates in Australia in the late 19th century are an historical example of tensions between families wishing to control the teaching of values and religious beliefs and state provisions for universal schooling. The 1990s debate about universal child care causes similar tensions.

'Rights talk' and children

The notion of children's rights, and particularly their embodiment in the United Nations Convention on the Rights of the Child, has

introduced other perspectives into discussions about the provision of services for children. The discourse about children's rights does not carry a single meaning, however, and this diversity is illustrated in the following chapters. But in essence, an assertion of children's rights changes the child from the subject of policies directed towards his or her wellbeing, development and protection, to the child as an active participant in constructing those goals and the means of achieving them.

As this collection reveals, 'rights talk' for children is neither a singular concept, nor is it by any means antithetical to the goals of many service providers. 'Rights talk' does, however, recast and extend goals already set under welfare and protection frameworks. There is no escaping, though, that children's rights raise the spectre of the undermining of adults in the society. In historical sequence, since the 1960s, rights have been asserted by blacks, women, the disabled and homosexuals. Blacks asserted access to power held by whites; women to that held by men; the disabled to access denied by the able bodied; and homosexuals to the status reserved for heterosexuals. It is obvious that children's rights are being asserted in a world of adult power; it is the world of parents, teachers, social workers, children's court magistrates, paediatricians and gynaecologists.

History also reveals the resistance of groups in power to assertions of rights, even though they may have had excellent practical as well as moral rationales. For example, including blacks in the polity and in the education system added to the human capital of post-plantation economies; it did not readily persuade the white people of Selma that black children belonged in their schools. Any group identified for the purpose of asserting their rights is not, however, likely to be homogeneous. This is certainly the case with children. Children may be rich or poor, and have different religious and cultural identities. In focusing on the rights of the child we assume a useful generic term; we must be careful that this assumption does not mask or negate other rights issues.

In Australia we have been chary of state control of children's education; strong to argue for pluralism based on respect for diversity; and ready to advocate parental autonomy in religious and cultural

beliefs and allegiances. It would be surprising if there were no resistance to assertions of children's rights, particularly given the ambiguity of who will interpret them and how. Is the state to intervene in family diversity, the powerhouse of pluralism, by means of a children's rights instrument? In the light of children's rights and the legal implications of Australia's signing in 1990 of the United Nations Convention on the Rights of the Child (the Convention), all service providers are therefore fundamentally challenged to rethink their goals, and their roles in achieving those goals.

Points of departure

Debate about children, law and rights is highly developed in Australia. The First World Congress on Children, Law and Rights (Sydney 1993) engaged lawyers and policy makers from around the world. Excellent books and collected papers, such as those by Alston (1995) and Alston, Parker and Seymour (1992), reflect the sophistication and purchase of multi-disciplinary approaches to children's rights as concepts worthy of debate at all levels.

The guiding thought behind this current collection was to make available to professionals who provide services for children – including parents – some of the informing principles of the children's rights debate. Going one step further, the collection explores legal regulation in areas of service provision, and how these regulations comply with principles and provisions in the Convention on the Rights of the Child.

The purpose of this book is not, nor could it be, a definitive statement on the compliance in Australian law with articles in the Convention. It is designed to provide some points of departure for discussions about the effectiveness of current regulations, the implications of the Convention on the Rights of the Child for current practice, and the limitations and inherent dilemmas the Convention poses.

Informing debate

Even the staunchest advocates of children's rights find that interpretations of the role of the Convention in respect to Australian law is highly debatable. The flow-on effects of Commonwealth Government

responses to the *Teoh* case, for example, are illustrative of the flux in administrative law in relation to international conventions. (The *Teoh* case is discussed several times in the following chapters; in Chapter 3, for example, it pinpoints dilemmas in administration law for signatories to the Convention.) There will no doubt be many subsequent challenges at law to the Convention on the Rights of the Child.

At another level altogether, there are clearly challenges facing adults brought up in an hierarchical society where authority is vested in adults. For all that we had an educational revolution in the 1960s and 1970s based on democratising the classroom, the current debates over corporal punishment show that Australian adults interpret authority over children in diverse and hierarchical ways (Cashmore & de Haas 1995). Thus this collection offers a starting point for service providers (for example, teachers, doctors, social workers, lawyers and police) to explore their own responses and interpret their own responsibilities in the light of the children's rights debate.

In bringing together expositions on law and the Convention on the Rights of the Child in a number of children's services areas, this book is designed to promote comparisons with, and comment on, irregularities in service provision. Indeed, definitions of 'the child' in Australian law are far from uniform, and entitlements and reciprocating responsibilities of children are variously prescribed. Unevenness in interpretations of 'child' and 'rights' by Australian States and Territories will doubtless raise issues about their responsibilities and authority, and that of the Commonwealth, in setting parameters for implementation that will promote equality of access and quality of services. The book is, finally, a collection designed to give impetus to informed discussion among professionals responsible for providing services for children.

The collection

Citizen Child: Australian Law and Children's Rights arose from an Australian Institute of Family Studies initiative in the International Year of the Family in 1994. The Institute has always perceived child and family policies to be inextricably linked – be that for children who live with their biological parents, or for children who come under the

care and protection of others at various times of the day, or at different periods of their lives – and the United Nations Convention on the Rights of the Child was seen as a formative instrument in the provision of services for children and families.

The idea for a collection devoted to children's rights in the context of Australian law and the United Nations Convention received strong encouragement by the then Acting Director of the Australian Institute of Family Studies, Dr Peter McDonald. Subsequently, the Australian Institute of Family Studies decided to commission a book that would engage the expertise of specialists in philosophy, law, social policy and child advocacy in comment and debate about the rights of young people in Australia, and make available their ideas to professionals responsible for the development and implementation of policies for children.

To this end, the Institute conducted in 1994 a colloquium at which identified contributors for the collection met, exchanged and developed ideas for the book's structure and content. From the papers presented, and the broad and lively discussion that ensued, the main directions and limits of this book emerged. The resulting collection of nine chapters on children's rights and Australian law explores the implications of the United Nations Convention on the Rights of the Child in a range of areas central to the wellbeing of children.

One of the guiding principles for the collection arising from the colloquium was that the 'rights discourse' needed to be put in some perspective. Australian cultural and legal history, for example, needs to be presented in a way that enables reflection on the particular 'baggage' we might bring to concepts of children in society, of regulation of children and families, and of the goals of children's policy. Although thinking about children's rights is well developed among Australian lawyers, academics and child advocates, and some excellent publications indeed exist, this body of work has not been so readily accessible to people at the coal face delivering services and making decisions which impact on children's lives.

It was therefore important that the contributors – Dr Judy Cashmore, Ms Sally Castell-McGregor, Ms Margaret Coady, Justice John Faulks, Mr Anthony King, Mr Robert Ludbrook, Ms Moira Rayner,

Mr Danny Sandor and Associate Professor Loane Skene – would not only be experts in their respective fields, but able to communicate clearly and decisively to a broad readership the key issues and dilemmas about children's rights and the relationship of these rights to the wellbeing of children.

It also emerged in the initial exchange of ideas that any discussion across different areas of service provision would entail some overlap and repetition. This has not, by and large, been edited out for two reasons. Firstly, because significant legal precedents often have applications – though not necessarily the same application – in several areas. From these comparisons it is possible to glean some of the reinforcing effects of cases in family law; for example, *Marion's* case may have flow-on effects in medical practice more generally. It is also intriguing to see how children's interests are handled in welfare and family law jurisdictions, and the interplay of state and federal law. The second reason for permitting repetitions is more practical. Each chapter may be read on its own as an account of how well services meet the standards set for children's rights in the Convention on the Rights of the Child.

Among the readership envisaged for this collection is an array of professionals providing services to children including teachers, counsellors, general practitioners, family lawyers, and others who deal with children in mainly ordinary and every-day settings. Professionals responsible for major interventions in the lives of the most vulnerable children – for example, those working in child welfare and protection, adoption, or juvenile justice – will perhaps find the advocacy of children's rights both vindicating of their professional endeavours and extremely challenging in terms of implementation. Readers are invited to engage in the debate, to reflect on the broad range of legal, social and policy analysis presented, and to take with them a heightened awareness of their own assumptions as they work with children.

Themes

In Chapter 2, *Reflections on Children's Rights*, Margaret Coady, a philosopher, locates children's rights in the context of philosophical approaches to rights in general. The chapter outlines different ways in which rights have been identified. These include seeing rights as the

protection of children from need and preservation of their freedom to act. Subsequently, different concepts of the child are considered – the child as autonomous and responsible for her actions, and the child as dependent and subject to care and protection. The chapter explores ways out of this apparent impasse and discusses criticisms of 'rights talk': that 'rights talk' expresses a Western chauvinism; that it expresses male values; and that it is too individualistic and denies important communal values. The chapter concludes that 'rights talk' has an important role to play in promoting the wellbeing of children.

In Chapter 3, *Self, Self-esteem and Sense of Place: An Australian Framework for Children's Rights Claims in the 1990s*, Moira Rayner, a lawyer and human rights advocate, sites current debates on children, rights and law within Australian history and culture. She argues a psychosocial thesis that Australian identity has been formed by the powerful motive of locking out the outsider in order to solidify the Australian identity. She traces this theme in our responses to ignoring the rights of minorities by insisting on conformity. The chapter considers the difficulties of identifying rights of children within a raft of State and Territory and Commonwealth laws until children have some 'rite of passage' where they assume adult responsibilities. Australia's obligations under international conventions are considered and the challenges to law in quarters as disparate as administrative law in immigration, family law and adoption law are detailed. In conclusion, the argument made is that as Australia comes of age, secure in its national identity, rights should be extended to children, native peoples and minorities.

Chapter 4, *Children's Rights and Family Law*, by John Faulks, a judge of the Family Court of Australia, reminds us of the evolution in rights which has taken place in family law over the last 150 years. It is against this history – when wives could own no property, when children were 'the property' of fathers, and private relations were publicly regulated to a startling degree – that the chapter considers the leaps and bounds of rights thinking and children's rights considerations in family law. Current family law reforms, it is noted, explicitly endorse the primacy of the child's welfare in divorce regulation, and the language of law is shifting to remove notions of parental ownership. The

chapter also deals with the welfare jurisdiction of the Family Court; for example, its exercise in cases involving the sterilisation of minors, and precedents which imply that children will have their voices heard through separate representation when their welfare is at issue.

In Chapter 5, *Children's Rights in School Education*, Robert Ludbrook, a children's rights advocate and lawyer, addresses an institution – education – which is almost invisible and thus often forgotten in terms of the law. As testimony to this fact he notes that some State Acts have remained unaltered for 60 to 70 years! Children's legal claims for education are also explored through policy documents and other legal instruments such as anti-discrimination legislation, criminal codes and contractual rights. The implications of the Convention on the Rights of the Child for school discipline policy and practice is developed as well as its applications for dress and deportment, home schooling, truancy and expulsion procedures. The chapter concludes with arguments for the usefulness of a rights approach in relation to education.

Chapter 6, by Judy Cashmore, a psychologist and Sally Castell-McGregor, a children's rights advocate, addresses the rights and freedoms of children in *The Child Protection and Welfare System*. The authors consider the dilemmas of family privacy and protection of children, and locate the dilemma within a framework of the English legal tradition of children as property. They outline ambiguities in definitions of abuse and neglect in Australian society, and in the roles of authorities in reporting and intervening. The chapter considers the implications of the Convention on the Rights of the Child for mandatory reporting and the provision of substitute care. The authors tackle the dilemmas inherent in recent policies of family preservation, partnership between family and state, and the rights of children to be heard in all decisions affecting their wellbeing. They conclude that the right of children to be heard in the state/family/child situation is essential, and lament the lack of an empirical research base on how this goal might be achieved.

In Chapter 7, *Kids, Cops, Lock Ups and the Convention on the Rights of the Child*, Danny Sandor, a youth advocate and lawyer, applies the Convention on the Rights of the Child to juvenile justice. The three principal aims of this chapter are to demonstrate the gap between rhetoric of service provision and practice in juvenile justice; to signal

where Australia fails to meet the expectations laid down in the Convention on the Rights of the Child; and to consider where improvements can be made in the system and in compliance with the Convention. The conditions of the juvenile are considered in relation to the process of police custody from arrest to bail. Statistics on juvenile crime are used to demonstrate infringements of the Convention, and also to show how better compliance with it may be achieved through practice, program and systemic changes. In the latter wider view, the author argues that Australian society should review its image of juveniles and the role of media, police and other groups in forming that view.

In Chapter 8, Loane Skene, a legal academic, considers the rights of the child in *Medical Procedures for Children*. In answer to the question, 'Who decides on medical procedures for children?', the author shows the relationship between age of child and the capacity of the child to make decisions independently of her parents or guardians. Procedures to which parents may not consent are described, and limitations to parental authority by recourse to the principle of the 'best interests of the child' are illustrated. In addition, the authority of other relevant adults, including step-parents, is outlined. The shading of responsibility between parent/guardian/adult and child in adolescence is defined and discussed in terms of the *Gillick* case. Finally, the dilemmas of applying the United Nations Convention on the Rights of the Child in domestic law are described. The author concludes that minors' wishes may well continue to be overridden by recourse to other interpretations of the 'best interests' of the child.

Chapter 9, *Income Support for Children and Young People*, by Anthony King, an economic policy analyst, squarely faces definitional problems about children and young people in Australian law and policy. The final chapter in the collection, it shows the many ways in which young people's entitlements to income support are considered under Commonwealth and State and Territory laws. Although there are few 'rights' enshrined in law for income support, entitlements are defined functionally by category of residence, educational status and the like. The chapter gives an overview of entitlements of children from early years to notional adulthood. The lack of integration between support provisions becomes apparent, as does the child's independent access to such provisions. The only unconditional entitle-

ments for children, either directly to them or to their parents or guardians, are Medicare and the provision of primary and secondary education; all other income support is conditional. The implications of this are discussed in relation to the Convention on the Rights of the Child.

Caring and rights

Children were once considered as neatly dependent and subordinate to authority. The children's rights rhetoric challenges both those assumptions. It does so through international conventions and through legal precedents set in unusual cases. Two cautions come to mind. Firstly, children, the elderly, and women who have other dependants in their care, all have dependency needs. It would thus be rash to sweep away the legitimacy in our society of needing care and of giving care. Altruistic caring and receipt of care, and rights-based publicly endorsed care, are both required. In a strong civil society people want to and *need* to have these bonds. Secondly, the ideal society, I would hazard, also needs free reign to be given to these bonds so that individuals are linked and fully incorporated into a society with the degree of cohesion required for what the French call 'solidarité'. Legislation is always the fall back position, the sledge hammer; it can never do the fine work that is the hallmark of a civilised society.

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2
Reflections on Children's Rights

Margaret M. Coady

The moral category of rights has often been seen as a means by which the less powerful can protect themselves or be protected against the decisions and actions of a majority. On the face of it appealing to the idea of rights for children is a way of promoting their wellbeing. Rights can act as 'trumps', to use Ronald Dworkin's metaphor (Dworkin 1977, p.92), to overrule decisions which could otherwise be justified by appeal to values such as efficiency. Within moral theorising, there is a tension between those theories which emphasise rights and duties and those which emphasise consequences. It has been a criticism of the cruder forms of consequentialism or utilitarianism that they do not allow for rights, and that they can justify great harms to individuals by appeals to values such as the common good or efficiency. But more sophisticated forms of consequentialism (Parker 1992) are often distinguished from cruder forms partly by their attempts to avoid this result.

Alternative views of rights

In the discourse accompanying the struggle for justice by women, gays, blacks, and so on, rights have played a dominant role. In each of these cases, the demand for rights was a demand for more freedom by oppressed groups to pursue their own interests. It was a rejection of the paternalism of the state, or of men, or of straights, or of whites, who, sometimes acting for good motives, thought that the group in question was unable to determine their own lives. To claim a right was to claim a power to exercise autonomy, to determine one's lifestyle.

But as far as children are concerned, the discussion of rights until recent years has seen rights in a rather different light. What has been

up to now the most powerful statement of children's rights this century, the Declaration of the Rights of the Child (first adopted by the League of Nations in 1924 and amended under the banner of the United Nations in 1959), is unashamedly paternalist. If we understand rights as powers or freedoms to act, the 1950s Declaration actually removed rights from children. While stressing protection and the provision of medical care and so on, the Declaration nevertheless deprived children of the right to work, of the right to live away from home, and of the right to refuse an education. It was not a document aimed at increasing the autonomy of children, but at protecting them.

The so-called 'child liberators', such as John Holt and Richard Farson, argued that rights for children would only be achieved if children were allowed to be self-determining. For these child liberators, children were similar to other groups seeking recognition of their rights. Just as calls for the protection of women had, in fact, covered up endemic exploitation of them, so led the idea that the purpose of children's rights was to protect children to depriving them of many of the rights held by adults. In *Escape from Childhood*, Holt (1975) went as far as demanding that all children should have the right to vote, arguing that any group which does not have representation on law-making bodies will inevitably be exploited. Farson (1974, p.11) argued that 'the acceptance of the child's right to self-determination is fundamental to all the rights to which children are entitled'. The child liberators believed that children should have the same rights as adults. They saw rights as powers or freedoms, and emphasised autonomy and competence.

These were extreme views, and with hindsight they may seem completely unrealistic, but they were part of a move away from seeing children as helpless, dependent creatures who were unable to make reasonable decisions. Changes in both law and administrative practice over the last 20 years have shown an increasing rejection of the view of children as incompetent. The 1989 United Nations Convention on the Rights of the Child (the Convention) ratified by the Australian Government in 1990, for example, shows clear influence of the idea of rights as powers or freedoms, and a recognition that children are, in many cases, able to exercise these powers. While protection of the

child is still a major focus in the Convention, there is increased acknowledgment of the child as a competent decision-maker on matters which concern the child's future. For example, in addition to clauses declaring the child's right to freedom of expression, freedom of association and freedom of thought, conscience and religion, there is a clause asserting the child's right to be heard in all judicial and administrative proceedings affecting her.

The law in the various States and Territories of Australia has also moved towards a greater recognition of what could be called the 'freedom rights' of children. One example of this growing recognition is to be found, for instance, in the increase in the degree of acceptance of children's testimony in Victoria; another example can be found in the court's interest in whether a child has been fully consulted about, and has understood the implications of, a decision about whether to make public the fact that she was a victim of sexual abuse, before that decision is made.

But it seems that advocating children's rights is not as straight forward as advocating the rights of other under-privileged groups, and that a major difficulty comes from the notion of rights themselves. As Martha Minow (1986) puts it:

> 'The rhetoric of rights dominant in legal discourse poses a choice between persons under the law being treated either as separate, autonomous, and responsible individuals entitled to exercise rights and obliged to bear liabilities for their actions, or else as dependent, incompetent, and irresponsible individuals denied rights, removed from liabilities, and subjected to the care and protection of a guardian – or the state.' (p.15)

Legal and moral rights

However, the view which Minow describes as dominant is, in the end, an over-simple view of rights. Rights are not simply powers we have as a result of laws. Apart from legal rights, there are also what have been called 'moral rights'. For example, before women had the legal right to vote, they claimed a moral right to vote. In this example, as in many other examples of moral rights, the claimants were working towards turning a moral right into a legal right – in other words, into a claim

which could be supported by the positive law. But not all moral rights can or should become legal rights. It makes sense to talk of a child having a moral right to a loving home, but although legislative, procedural and policy changes could increase the likelihood of this moral right being achieved, this particular right could not be turned into a legal right.

Some philosophers, of whom Jeremy Bentham is one, have denied that rights other than legal rights can exist. Bentham (1791) famously went so far as to describe talk of moral rights as 'nonsense on stilts'. But such rights do play a central role in our moral vocabulary. In fact many important rights, such as the right to free speech, the right not to be tortured, the right to freedom of association and so on, are most often appealed to precisely in situations where laws exist which restrict, rather than support, these basic rights. The real difficulty lies not in recognising what is being talked about when moral rights are claimed, but in justifying moral rights. Where legal rights are concerned, we can point to the positive law as support for their existence, but what is the equivalent for moral rights? Eighteenth century rights theorists often thought of a natural law or divine law as bearing the same relationship to moral rights as the positive law did to legal rights. Today appeal to natural law is less fashionable, but there are compelling moral norms, grounded in trenchant arguments, which support the existence of many moral claims or rights.

In that they need to be argued for and justified, claims to rights are not just the expression of what Glendon calls 'insistent, unending desires' (Glendon 1991, p.171). She sees rights talk as 'converging with the language of psychotherapy' and encouraging us in 'our all-too-human tendency to place the self at the centre of our moral universe' (Glendon 1991, p.xi). It is true that those who are unsympathetic to particular claims may see these claims as merely the expression of desires. Women who were demanding the vote at the end of last century received unsympathetic responses of this kind and were perceived by many as making irrational, whimsical demands based on mere wants. It may indeed be the case that some groups do, in fact, express what can only be seen as wants in terms of claims to rights. But in doing so, such claimants are asserting a particular status for their

wants, and saying that they are more than simply desires. By calling them rights, they are asserting that there are good reasons why they should be given what they claim, independently of the fact that they claim it or want the claim acknowledged.

Freedom rights versus welfare rights

A more important aspect of Minow's worries about rights is not whether rights are primarily legal entities, but whether only fully competent, autonomous beings can be said to have rights. If this is so, then contrary to the views of the child liberators, there is a problem about a range of rights for children. In spite of growing recognition that children have more in common with adults than would have been generally believed 40 years ago (Holt 1975), there is a limit to the minimum age at which it would be reasonable to allow a child to vote, to decide where she will live, or to sign contracts worth sizeable amounts of money. Many of the rights which will be most important for children will not be freedom rights exercised by autonomous human beings, but will remain rights to protection.

Those (Farson 1974; Holt 1975; O'Neill 1992) who see rights as powers or freedoms will be sceptical about the existence of such protective rights. For such writers the paradigm right is a power or freedom to act. The right to free speech, the right to drive a car, and the right to smoke are examples of such rights, albeit that these freedoms are hemmed around by certain restrictions regarding how, when and where the freedoms may be exercised. Any justified restrictions on a person's exercising these freedom rights will be tied to the possibility that such exercise will cause harm to other people. This is the central message of J.S. Mill's *On Liberty* (1974) and of the liberal tradition. There were a number of reasons why Mill defended these freedoms, the main one being his belief that individuals were in the best position to know their own interests. But Mill was explicit that the right to free action, as long as such action did not harm others, was not a right which was held by children, for children, unlike adults, were not in a position to know what was in their best interests.

These freedom rights make few demands on other people other than telling them not to interfere. The right to free speech, for example,

means that there should not be laws, regulations or practices which prevent a person from putting forward a point of view, no matter how unpopular or objectionable that point of view is. But this right does not involve providing the person with a platform. Similarly, the right to smoke could mean that a person should not be prevented from smoking in a place where she could not be causing harm to any other person. It does not, of course, entail that a person should be provided with cigarettes.

But the situation is very different in regard to most of the rights contained in the 1950s Declaration of the Rights of the Child, as well as with many of the rights in the 1989 Convention. When we say that a child has a right to medical care, we are not saying that nobody should interfere with the child's right or freedom to seek medical care. We are saying that some person or body should provide the child with medical care. These rights, sometimes called welfare rights, demand action by some other person or body to provide the means by which they can be implemented, and not simply freedom for the person who holds the right. The term 'welfare' in this context is not, however, to be identified simply with state-provided social security benefits. The right to information is one such example. Rights to education, to medical care, to recreational facilities, to a decent standard of living and so on, fall into this category of rights which are primarily demands on others to provide benefits to the rightholder.

If we could draw up an exhaustive list of children's rights and compare this to a similar list of adults' rights, more of the children's than adults' rights would fall into the category of welfare rights. This is both because certain benefits, such as education and medical care, are deemed essential to a child's development, and because the child is seen as unable or less able than an adult to secure these benefits for herself. Alternatively, the child may be unwilling to claim these benefits because she does not recognise their importance to her.

While there is an important distinction to be made between freedom rights and welfare rights, this is not always a sharp distinction. Even a property right, a paradigm case of a freedom right, is not simply a right conferring freedom, control and authority for it also involves, when it is threatened, the right that police take action to support it.

In other words, it does not simply refer to the rightholder's freedom. It would also be a mistake to see the distinction between these two kinds of rights as meaning that the welfare rightholder is necessarily passive and dependent while the freedom rightholder has autonomy and control, for just as one can claim and defend freedom rights, one can claim and vigilantly defend welfare rights.

Problems with welfare rights

Nevertheless, children have been seen as incompetent to make claims either of freedom rights or welfare rights, and the welfare rights that have been granted to them have often removed the freedom rights which they would have had as adults (see Rayner, Chapter 3 in this volume). The freedom to seek employment, to make contracts, to buy and sell property, to decide with whom one will live or whether or not to continue one's education, are all very important freedoms for an adult, but the welfare rights bestowed on the child deprive her of these very freedoms.

Another objection to extending the notion of rights to include welfare rights is that this extension results in such a dilution of the notion of rights that the concept becomes redundant. In terms of this objection, saying that someone has a right to a particular benefit is equivalent to saying it is good that they receive this benefit. For instance, rather than saying 'a child has a right to education and medical care', it is argued that we could just as well say: 'It is a very good thing, or very important, that a child has education and medical care.' But this objection can be met by noting that there is a difference between the two locutions. In saying that someone has a right to something, we are going beyond saying that it is a very good thing they have the benefit in question to asserting that, except in extraordinary circumstances, they *must* be provided with the benefit.

To understand the concept of a right as it is commonly used within our moral discourse, then, we must resist the idea that a right is necessarily a power conferred by law, and accept in its place a more diffuse notion of rights in which there are certain tensions. Nickel (1987) sums up this more complex view of rights in the following way:

> 'By prescribing the availability of a good to rightholders and imposing on the addressees normative burdens that direct their conduct toward making this good available, rights serve to confer and protect important freedoms, powers, immunities, protections, opportunities and benefits. Such normative structures can exist in actual and justified moralities and in local, state, national, and international legal systems. Legal enforcement is often important to making rights effective, but such enforcement is not essential to the existence of rights.' (p.35)

The special case of children

This broad and complex understanding of rights includes children as possible rightholders. But it does not solve all the problems involved in the notion of children's rights. In particular, it does not solve the problem of clashes between rights that are freedoms or powers and opposing rights that are benefits or protections. The freedom to smoke, for example, is opposed to protection from the ill-effects of exposure to nicotine; the freedom to seek employment is opposed to protection from possible exploitation by employers. The freedom to refuse medical treatment, at its most dramatic, is opposed to protection from deadly disease. These are not easy issues to solve and our ambivalence about really allowing children to exercise freedom rights is demonstrated by the fact that it is likely to be headline news if a 15-year-old refuses further potentially lifesaving treatment on the grounds of its pain and uncertain outcome, but of no media interest if a 55-year-old does the same.

There is, however, a middle way between buying the whole story of the child liberators and returning to the protective stance of the 1950s declaration of children's rights where adults are making all the decisions. This middle way will involve the recognition that children are more competent to make their own decisions than previously was recognised, and that this competence can exist even where the child's decision is at odds with what her parents or teachers or social workers would decide. A child's degree of competence will normally increase with age, and will vary from one field of activity to another. So at quite an early age, a child may be more competent than her parents to

choose her friends, but less competent to decide whether or not to wear a seatbelt. Assessing a child's level of competence will depend in part on empirical evidence, such as that already available on the reliability of children's testimony, but in many cases it will also involve an imaginative shift in our understanding of the nature of childhood.

This imaginative shift has been facilitated by the writings of child liberators such as J.S. Mill. The sharp division between the adult who has freedom rights and the child who does not, is no longer tenable. Mill's view was that freedom rights were based largely on the assumption that the individual adult was the best judge of what was in his or her own interests. We now recognise that the differences between adult and child are not so great that the parent, teacher, social worker, lawyer or judge can claim to know the child's interests if they do not consult with the child. As Eekelaar (1992) says, recognition that children have rights entails listening to them, working out what is important to – and the preposition 'to' rather than 'for' is significant – a particular child. Mechanisms need to be in place in families, schools and in all other institutions affecting a child's future to ensure that the child can express her point of view and have it considered.

If we accept that children have more in common with adults than was previously recognised and that therefore they are entitled to adult-type freedom rights, we must nevertheless admit that children will not always be able to exercise those rights for themselves. This leads to two further questions: Which person or group should claim the rights for the child in the event of the child not being competent? What criteria should be used in making that decision?

Criteria for claiming a child's rights

With regard to the second question, one traditional criterion, that any decision taken on behalf of the child should be 'in the best interests of the child' has come under attack (Eekelaar 1992; Rayner 1994) for being too paternalist. In addition, although this criterion may be appropriate and important in some circumstances, such as deciding between two possible custodians for a child with divorced parents, it is often more difficult to apply, and possibly unfair, where there are clashing interests of other children as well as adults.

Though 'the best interests of the child' is still referred to in the United Nations Convention on the Rights of the Child, the phrase carries the implication that someone other than the individual concerned, some adult or group of adults, is in the best position to judge the interests of the child. It thus ignores the central liberal insight about freedom rights: that the *individual* is usually in the best position to know what is in her own interests.

Of course, we are discussing here cases where the child is considered to be 'not competent' in respect to making a particular decision. But this does not mean that the child's wishes, however they are expressed, can be ignored. Eekelaar (1992, p.229) attempts to overcome this problem by suggesting a 'substituted judgment' test in place of the often misused 'best interests of the child' test. According to this 'substituted judgment' test, a judgment would be made about what the particular child would have chosen had she been in full possession of the relevant information, and intellectually mature enough to make a decision. This test may or may not lead to the same outcome, but the process leading to the decision would be different with the court endeavouring to ascertain the current wishes of a particular child.

Parents' rights

An equally difficult question is: Who should make claims for the child that is too immature to make claims for herself? Recognition that children have rights as individuals is sometimes seen as a threat to parents' rights. Christopher Lasch (1992), for example, is critical of Hillary Clinton's involvement in the children's liberation movement on the grounds that the movement undermines the authority of the parents. He argues that although Clinton has claimed in various writings to be defending children's rights against both the family and the state, in fact, because children's competence has been overstated by the child liberators, the overall effect will be to undermine the family and leave the child at the mercy of the state bureaucracy.

There has been a long history, claims Lasch (1992), beginning with the child savers of the 19th century, of denigrating the family's ability to raise children. What is needed, he says, is support for the family and other institutions intermediate between the individual and the state

against the welfare state's tendency to turn citizens into clients, and against the power of the culture of consumption. Another group of writers (Archard 1993; Olsen 1992) is more sceptical about whether children's rights will be promoted by the family. They point to the way in which liberal ideology supporting the privacy of the family has in fact led to a condoning in practice of exploitation and violence within the family.

Rearing children is a difficult, expensive and sometimes thankless task. Interesting recent work (Folbre 1994; George 1993) points out that children have moved from being an economic asset, as in Adam Smith's time, to that of an economic liability to their parents, while still remaining an economic asset for the community as a whole. It would be an economic and social disaster if everyone made the 'economically rational' decision to remain childless. No doubt parents often feel that undertaking the task of parenting gives them certain rights over their child and, at the very least, they are the obvious candidates to make those decisions which the child is not competent to make herself.

But even though parents may have invested time, money and effort in rearing their children, this does not necessarily give them rights over them. The relationship between parent and child is not like a contract between two people in which one agrees to put in capital or labour and the other incurs a debt and recognises the right of the other to recall the debt, for family relationships are not consensual in this way. The child did not contract to be born into the world or into a particular family, and in some cases even the parents' involvement is not consensual.

Archard (1993, p.109) argues that there are a number of other reasons why mere biological parenthood does not necessarily give natural parents the right to rear. Archard distinguishes biological parenthood from moral parenthood. The latter, moral parenthood, he believes comes about as a result of one or more people being willing and able to give the child the love and care that will enable it to have the best possible upbringing. In most cases, the moral parents will also be the biological parents; however, Archard is concerned to point out that the parental right does not necessarily follow from biology, though

given the facts about bonding it is extremely likely that the moral parents will be identical with the biological.

The public/private dichotomy

Nevertheless, a parental right is very different from, for example, a property right. It is a fiduciary right rather than a characteristic freedom right. In other words, it is the right to look after the rights of the child, and in that way is more like a duty than a right. It does, however, give the parent the power to make certain decisions for those children who are not able to make decisions for themselves. But this is not an unqualified power. For if parents consistently act in a way that clearly harms the child, the right is forfeited.

This is clear enough in theory, and difficult to challenge in extreme cases. The real problem concerns whether the state should always be viewed as some kind of superparent (Kipnis 1993) and, if so, when and how it should intervene in the family. On the one hand there are the views of Goldstein, Freud and Solnit (1979) who believe that: 'The child's need for safety within the confines of the family must be met by law through its recognition of family privacy as the barrier to state intrusion upon parental autonomy in child rearing. These rights – parental autonomy, a child's right to autonomous parents, and privacy – are essential ingredients of "family integrity".'

But many writers, for instance Archard (1993) and Olsen (1992), see a problem with a family having a right to privacy at all. They point out that the family is already in some sense public because many of the state's laws and policies regulate families and determine both what constitutes an acceptable definition of 'family' and many of the roles within it. They also point out that injustices occur within most families and that harms, such as child abuse, occur in many. Archard and Olsen's views gain some support from the fact that it has been accepted practice, at least until recent times, for state authorities such as the police to not intervene in families until after clear and obvious harm has occurred. The reasoning for this practice seems to lie in some idea of respect for the privacy of the family.

The broad theoretical background of non-intervention in family affairs is both controversial and confusing. What has rather fashionably

come to be called the 'public/private dichotomy' has been blamed for the exploitation of both women and children. Carole Pateman (1987, p.103) argues that the 'dichotomy between the public and the private ... is, ultimately, what the feminist movement is all about'. It is certainly true that theorists of justice from Aristotle to Rawls (Okin 1989) have not come to terms with the question of justice within the family. Many such theorists assume that issues of justice will only arise in the public sphere, and that the private sphere of the family, by contrast, is bound together not by concerns of justice and contract, but by natural ties of affection. This relegation of women, and with them children, to a separate domestic world where issues of justice are not recognised, has both caused and concealed many injustices and abuses.

Recognition of this theoretical background is important for those looking at justice for children. But distortions and misunderstandings related to the 'public/private' dichotomy exist which could lead to throwing the baby out with the bath water. For attacks on liberalism often amount also to attacks on the notions of rights advocated by liberals. These distortions and misunderstandings occur in those writers, such as Jaggar (1983), who link liberalism to the public/private dichotomy and blame liberalism for the injustices discussed above. But Kymlicka (1990, p.255) points out that what he prefers to call the public/domestic distinction has a much longer history than liberalism. In that most male liberal thinkers were committed to some public/domestic distinction because they assumed that women would continue to be responsible for domestic work, they were no different from the political philosophers who were opposed to liberalism. This public/domestic distinction, which has continued to undermine women's hopes for equality, is not a phenomenon of the last few centuries nor an invention of liberalism. Rather, it is deeply rooted in ancient Greek philosophy.

Liberals were as guilty as those opposed to them of assuming and thereby promoting this public/domestic dichotomy. But the particular public/private distinction which is the mark of liberalism is different in important ways from the public/domestic dichotomy. What liberals such as J.S. Mill argued was that there should be a broad sphere in

which individuals could determine their lifestyles, their companions, their practices and their views. This private sphere should be available to both women and men, and, as long as harm was not being caused to others, the state should not interfere. In particular, the state should not be able to enforce morality. It is important to note that liberalism's public/private dichotomy understood in this way does not condone the failure of state authorities to intervene in cases of spouse or child abuse. For in these cases clear harm is being caused to other persons.

Liberalism and individualism

Other attacks on liberalism, and often by association on the notion of rights, come from those who identify liberalism with extreme individualism. Jacob Joshua Ross (1994, p.8), for example, writes of 'individualist liberalism', a term which he uses in referring 'to those whose moral and political outlook places a special, almost exclusive, emphasis upon the values of personal liberty and autonomy'. He claims that this kind of liberalism, stemming, he believes, from the Age of Enlightenment in Western European thought, is responsible for spawning attacks on the traditional family by feminists and gay rights activists. Ross claims that liberalism is both a moral and a political outlook, and the moral outlook he describes as liberal is moral relativism or subjectivism – the view that all moral outlooks are equally good and that there is no way of choosing between them through reflection, discussion or deliberation.

But liberals of the Millian kind are not committed to any such view about morality, although the moral sphere was certainly important to Mill. What Mill himself opposed was a state-imposed morality. He believed that individuals should make their own choices in the moral realm not because it did not matter what they chose, but because the act of choosing was essential to making the act a moral one. Put simply, performing a good act because someone has a gun pointed at one's head is not to act morally well, but simply to behave prudently.

From a less conservative viewpoint than that of Ross, Glendon (1991) also attacks rights talk as excessively individualistic and as expressing moral subjectivism. Glendon belongs to a comparatively recent grouping of political theorists who call themselves

communitarians, and who present themselves as alternatives to the extremes of both right and left. She sees many claims of rights as simply assertions of wants. Unlike other writers, however, she does not reject the whole tradition of liberalism, but rather the form that rights discourse has taken in the United States:

> 'A rapidly expanding catalog of rights – extending to trees, animals, smokers, non-smokers, consumers, and so on – not only multiplies the occasions for collisions, but it risks trivialising core democratic values. A tendency to frame nearly every social controversy in terms of a clash of rights (a woman's right to her own body vs. a fetus' right to life) impedes compromise, mutual understanding, and the discovery of common ground. A penchant for absolute formulations ('I have the right to do whatever I want with my property') promotes unreal expectations and ignores both social costs and the rights of others. A near-aphasia concerning responsibilities makes it seem legitimate to accept the benefits of living in a democratic social welfare republic without assuming the corresponding personal and civic responsibilities.'

Glendon's attack on rights is of the splatter-gun variety and there is no space here for a full response to each of her attacks. Nevertheless, it is important to point out that few supporters of rights claim that rights can never clash or can never be overridden. Most would agree, for example, that one person's right to free speech may clash with another's right to a fair trial, and it is a question of determining which right should be given priority rather than dropping the talk of rights which are such vital aspects in determining guilt or innocence. Similarly, many would agree with Glendon that 'responsibility' should be discussed as often as rights. But again, recognition of responsibility is not a reason for dropping talk of rights.

Rights are an important part of the moral vocabulary, but they should not be taken as the whole of it. The danger is that just as children's rights are beginning to be recognised, attacks on rights talk, which cite misuses of the rights vocabulary and produce extreme examples such as rights for trees, will so discredit the concept of rights

that genuine and justified claims both by and on behalf of children will be ignored.

Further attacks on rights

Another criticism of rights talk made by communitarians is that discussion of rights tends to put one group against another. The argument here is that the dimension of sociality is missing from the rights discourse; that people are in important ways constituted by their social ties and that the rights discourse, in depicting an isolated individual who may have interests opposed to the social groupings to which she belongs, heightens tensions within and between these social groupings. Where this is applied to families, it seems a re-statement in many ways of the view that in groups bound together by affection, we do not need to consider justice and rights; if people really love one another, why then do we need to talk about contracts, agreements and rights?

Susan Moller Okin (1989) has given decisive answers to these questions where they concern women in families. She argues that even in the most loving of families, especially given a long tradition of family structures which are inimical to women achieving equality, the question of justice and rights needs to be considered. Minow (1991) looks at these issues as they relate to children, citing the example of a pregnant minor seeking an abortion where her family will not give consent for religious reasons. She argues that although family consultation should be tried in such a case, it is unlikely to be successful. 'Assertion of rights in these circumstances', says Minow (1991, p.292), 'does not initiate conflict but rather gives existing conflict public expression and invites public resolution'. Archard (1993) points out that the loving relationship between family members does not always exist, and that where it does exist the love may be stifling of a child's ability to have any life separate from the family if the child is not assured that she also has rights.

The real difference between the liberals and the communitarians lies in the role that each is prepared to give the state, the communitarians being more prepared to allow the state to enforce the decisions of the community. At a time when liberalism is under attack from many sides, it is particularly important to restate liberal views

about the upbringing of children. In the words of the modern liberal, John Rawls (1971, p.543), the state exists to protect 'the free internal life of the various communities of persons and groups to achieve … the ends and excellences to which they are drawn'. The liberal point of view is premised on the fact not that there are no excellences to be achieved and recognised, but that these are complex, often difficult to specify in advance, and impossible to impose from outside.

Excellence in parenting fits this model exactly. Much is known about good parenting but much is also unknown. Parenting involves a complex of values and techniques. It requires understanding, persistence and imagination, not to mention money and energy, and involves both knowledge of and judgments about competing values. Even after these judgments are made, a good deal remains outside the conscious control of the parent. To say that every upbringing of a child is paradigmatically an experiment in living, is not to say children are guinea-pigs in some kind of research project, but simply to recognise the complexities of the process of parenting.

Given these complexities, the liberal attitude that there are many different but equally good ways of bringing up children in a variety of kinds of families seems the appropriate one to adopt. This does not mean that the state and other groups and persons should not make interventions when children are being harmed or are likely to be harmed. Sometimes these interventions will need to be radical; at other times support, advice or the opportunity to discuss with others a range of views about childrearing or techniques of coping with children is all that may be needed. Raising children is an inescapably moral activity that cannot be done 'best' if childrearers feel that state bureaucrats or other groups are constantly evaluating their performance. But childrearing may be improved where both the activity and the carers' knowledge and experience can be shared with a number of people. Not only will this ease the physical burden of caring, but also encourage reflection by childrearers on the nature of the task they are involved in.

The broad application of rights

In considering the broad application of rights, a question to be addressed is: can rights be universal? Some critics of children's rights

focus their criticism on the claim that rights are universal, a claim they apply to all children regardless of the country in which they live. Statements of rights such as the United Nations Declaration of the Rights of the Child and the more recent Convention on the Rights of the Child are particularly under attack here. Frances Olsen (1992) portrays post-modern feminists as particularly worried about the aspiration of the United Nations Convention to deal with all children throughout the world. According to Olsen (1992), these feminists are concerned that attempts to produce a statement of universal rights 'will almost inevitably result in a western-oriented document that merely purports to be universal'.

Though Olsen attributes this concern about Western chauvinism to postmodernism, it is a view with a much longer history. Ever since the United Nations sought to proclaim universal rights in the aftermath of the Second World War, concern has been expressed, particularly by those with anthropological pretensions, about the ethnocentrism of such declarations. In 1947, when the Universal Declaration of Human Rights was being discussed, the executive board of the American Anthropological Association cautioned that the Declaration would be 'a statement of rights conceived only in terms of the values prevalent in Western Europe and America,' and went on to say that 'what is held to be a human right in one society may be regarded as anti-social by other people' (American Anthropological Association 1947, p.540).

There is a smidgen of truth in what the postmodernists and the earlier anthropologists say on this matter, but this truth can be easily distorted and does not add up to a reason for rejecting the idea of universal rights. Clearly, there are differences between different cultures on moral matters. For example, significant differences occur between countries and cultures in their attitudes towards involving children in armies. But it does not follow that there are no underlying facts and values – about maturity and about the nature and the effects of war – that can be used to evaluate the practice in whatever country it occurs. These same facts and values can also be used to criticise the Western practice of admitting 18-year-olds to armies.

Those who believe there is no way of evaluating particular cultural beliefs and values apart from whether they contribute to the survival of

the culture are called cultural relativists, and their views have been refuted by a number of very different philosophers (Gardner 1983; Nickel 1987; Singer 1979; Williams 1972). Gardner (1983, p.94) points out that many anthropologists, of whom Ruth Benedict is one example, are inconsistent in their espousal of cultural relativism. Far from refusing to make any judgments in a way consistent with cultural relativism, Benedict was prepared to pass judgment both on the moral practices of her own society, of which she was critical, and on those of other societies – for several of which she expressed great admiration.

In practice, with regard to the minimum age at which children could be asked to perform military service, a compromise was reached by those formulating the United Nations Convention on the Rights of the Child, and the age of 15 years decided upon. This may seem too young an age to some, but differences of opinion on this matter do not show that values are simply relative to culture; they merely illustrate the perceived varying needs and adherence to tradition of different groups. In any case, it is not only universal rights that are rejected by the cultural relativist, but any moral basis for arguing for the well-being of children that is not just a restatement of the values of one's own society.

A second question to be posed in considering the broad application of rights is: do rights make a difference? The answer to the question of whether rights make a difference is yes, and it is a difference that can bring benefits to children. Few advocates of children's rights would support 'abandoning children to their rights' (Hafen 1986, p.445); in other words, denying protection to children through a pretence that they are always competent to claim their own rights. These advocates recognise that children are dependent in many ways, just as many ageing adults are also dependent. But attention to children's rights can clearly show that respect for the particular child should take precedence, for example, over ease of management. Recognition of freedom rights implies that the wishes of the particular child must be considered. This means, among other things, that children must be allowed to make mistakes, but not mistakes that will irreparably harm them. One principle which could be considered is that custodians of a child should only veto a child's decision where that decision is

interfering with the rights of another, or where irreversible and serious harm would be caused to the long-term future of the child.

It is important to recognise rights, but also to realise that they are not the whole of the moral story. Rights by themselves will not solve the problems raised by child abuse or family conflicts or caring for the intellectually disabled child. The language of love, care and responsibility is also needed. But the recognition of children's freedom rights has certainly given a new perspective to the analysis of these issues. The language of rights has not, however, given unambiguous answers; it has not made decisions any easier. It would be a mistake to look to rights to provide a rule-of-thumb answer to such problems. Rights, especially those written at the level of generality of the United Nations Convention on the Rights of the Child, inevitably require interpretation.

It may at the present time be particularly tempting to abandon talk of rights. Rights are complex concepts, not providing ready answers. They are under attack from conservatives because they seem to threaten the family, from communitarians because they seem to ignore important communal values, and from some feminists who deny that rights can be in any way universal or who see rights as expressions of male power. In the face of these attacks it is important to reassert the moral dimension of rights. The acknowledgment of children's rights in a way that is meaningful to them should mean that children are more likely to be consulted, and are more likely to have their dignity as human beings fully recognised.

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3

Self, Self-esteem and Sense of Place: an Australian Framework for Children's Rights Claims in the 1990s

Moira Rayner

The conception of an Australian identity began in 1788, when civil servants made this unexplored continent, this empty land, *terra nullius*, into a prison (Hughes 1987, p.1). The attitude of the criminal law to children as well as to adults was as harsh as the land; in 1844, for instance, the Western Australian Supreme Court sentenced a 14-year-old boy to be hanged for murdering another child (Garrick 1988, p.24). The waves of settlers who followed the first European migration – businessmen and women, land speculators, profligate sons, the disgraced and the fugitive – were followed over the years by the respectable middle class and, finally, by waves of poor migrants during the 20th century. Against the evidence of their own senses these early immigrants thought the land they came to belonged to no one, and brought death to what is estimated to have been about 300,000 Aboriginal people. Settlement proceeded along 'a line of blood' (Reynolds 1987, p.196).

The first settlers were immensely lonely and afraid in an alien land filled with 'treacherous blacks' (Brady 1994, pp.34–5). Today, we too seek to make our home many thousands of miles from the birth-places of our own ancestors, to make one culture out of many, one history out of a mere 200 years. We possess, but we are not sure whether, or how, we belong to a land soaked in the blood of its children, the Aboriginal people.

The cultural values of 20th century Australia are individualist, though our community perceives itself as something that Veronica Brady (1994, p.36) describes as a 'monolithic unity'; perhaps, because we need to belong to something and it cannot be the land, we cling excessively to each other. We seem to have built our community from a sense of distance and aloneness: our loss of our cultural origins, our exclusion from the Aboriginal relationship with the land, and our need to fence the wildness out and ourselves within. To develop a sense of ourselves we have created 'the other'. To enjoy a sense of belonging, we have made it clear that some people do not belong.

Family and children's rights in Australian law

One of our most cherished Australian, and indeed human, icons is 'the family'. On the one hand, a 'family environment' is a place where a child, 'for the full and harmonious development of his or her personality, should grow up ... in an atmosphere of happiness, love and understanding' (United Nations Convention on the Rights of the Child 1989). Because we value it so much, it is generally agreed that only when 'the family' fails should the state intervene. Intervention should proceed only after there is proof of a need, a process of investigation and determination which is fair and open, and after there has been a clear demonstration that the family has failed to reach legally defined and publicly stated standards of child care responsibilities. In that sense, 'the family' on the one hand includes the child, the old and the dependent, and on the other excludes the state and strangers. Only in that sense does a family have 'rights'. Individual members of families and the community have human and civil rights; the functional family is a fence against the infringement of those rights by others who have no particular, or certainly not the same kind of, interest in the well-being of its members.

The crystal of family life, in the sense of the 'ideal' patriarchal family of the industrialised middle-class in 19th century Britain which has shaped so much of Australian law and institutions, has been shown to be flawed. It is flawed not just by the discovery of child abuse in the late 1960s (Carter & Brazier 1969), or of the reported incidence of child sexual assault and emotional abuse from the early 1980s, but also

by what these breaches in the walls of family affairs have revealed. Our new awareness has made us question whether 'the family' can fulfil the roles expected of it, and to ask what is required of others to enable 'the family' to function.

One of the great unexamined issues, but one we are beginning to address, is the position of children in a community which does not recognise them as citizens. Put differently, we may ask what do we, as a community, really give children other than rhetoric?

Australian law generally withholds civil duties, rights and status from children until they pass through some formal rite of passage that more or less demonstrates an ability to accept some degree of adult responsibility beyond the family and in the wider world of the community. Historically, Australian common law addressed children through the responsibilities of adults towards them. There has always been at least some recognition, however, that children gradually acquire the competence to protect and promote their own interests. It has also been recognised that at some point their self-determination 'rights' prevail over their parents' powers to make those decisions for them. This has been accepted since the English House of Lords decision in *Gillick v. West Norfolk v. Wisbech Area Health Authority and Department of Health and Social Security* [1986] AC 112 (*Gillick* case) in 1986.

The *Gillick* case concerned children's powers to obtain contraceptive advice and treatment as they acquired 'maturity'; that is, the capacity to understand the nature and implications of the decision to be made. This right of self-determination could be recognised, in theory, at any age, depending on the nature of the decision to be made, the child's understanding, and adults' assessment of the child's competence and of what the 'right' outcome ought to be (that is, their assessment of the child's best interests). The *Gillick* decision unequivocally became a part of the law of Australia by its adoption by the Australian High Court in 1991 in *Secretary, Department of Health and Community Services v. JWB and SMB* (1992) 175 CLR 218 (*Marion's* case), a case about the proposed sterilisation of an intellectually disabled girl.

But self-determination or autonomy depend on, at the very least, self-awareness. The community has an interest in protecting the inter-

ests of children in achieving that end point, at which they can participate fully in community life as individuals.

In *Marion's* case, and in a subsequent decision in *Re P* (April 1994), which also involved a sterilisation decision, judges of the High Court argued that the community has an interest in the fundamental human rights of children. In *Marion's* case, the issue was whether a court should oversee parental decisions about incompetent children which affect the fundamental human right to bodily integrity. The Court determined that parents' rights are not absolute in such cases. Indeed, two judges pointed out that parents 'rights' over their children are more properly called 'fiduciary powers'; that is, they have the power to make decisions for their children which should only be exercised in the child's best interests. Where parental interests might conflict with the child's, where a parent's needs or desires might be different from the child's interests or could be preferred, there must be a safety mechanism: a court must also approve.

In *Re P*, a dissenting judge, Justice Brennan, went further. He said that even a court could not override 'the fundamental principle … that every person's body is inviolate'. To order a non-consensual invasion of a child's body (sterilisation), he said (albeit for a child's welfare, unless it was necessary to save the child's life or prevent serious bodily harm), would offend that principle. Such a decision, he said, might allow a fundamental wrong by allowing other human beings the discretionary power to assess 'best interests', even in the face of the child's own, or a parent's, objections. What was being argued in that case, was a hugely important issue: are there, or are there not, fundamental principles of respect for children's human rights and dignity, which will be respected in decisions of courts of law, and even of the Family Court of Australia?

The key concept, which we have only just begun to address in Australia, is precisely the fundamental principle of all 'rights talk'. Are there, in fact, any absolute human rights which children, as much as adults, share? For the High Court acknowledges that even parents in crisis – for example, at the point of the formation or breakdown of family relationships in bearing children, giving them up for adoption, or determining who their children should live or associate with –

might forget the primacy of the child's rights, which the child cannot assert because the parents' own needs are so pressing.

So, who, and on what basis, can be trusted to make these decisions, and on what basis of principle? For when there is a conflict of interest, a 'power' which is entrusted to one person to make decisions for another cannot be assumed to be exercised for the benefit of the dependent or vulnerable child.

We have only just begun to look at these issues, and it is not surprising that they should be coming to greater prominence after a decade in which Australia has increasingly subscribed to international human rights treaties. As our isolation from the outer world breaks down, we have also begun to look inwards. In defining our place in the international community, we are looking at where children stand in relation not only to their parents and carers, but to the community whose public and economic policy affects them. In addressing fundamental rights and power relationships, we are redefining 'community' as inclusive of people who are inarticulate and dependent and powerless. Finding their place has become a part of our search for a national identity.

There is more to building a community than digging sewers or sharing a camp fire. A group of people who live together develops, through a sense of shared values, a sense of interrelationship, responsibility to care for one another and, in that sharing, linkages into a social relationship. These values can be religious, political, cultural, philosophical or spiritual, but whatever we call them, they define who is part of and not part of that community, where it thinks it is going and why (Miller 1987, 1991).

These values, be they expressed or not, make a community which both includes, and excludes. We have come to realise that some kinds of shared values, such as racism or religious intolerance, and some kinds of exclusions damage that sense. We have begun to talk about human rights in a policy-relevant way.

Australia has ratified many international human rights instruments. However, few were as controversial within this country as our ratification of the United Nations Convention on the Rights of the Child (the Convention). The very idea that children had human rights was perceived to be a threat to the power of parents over children and,

more specifically, to their ability to exclude the state – strangers – from their most important relationships as individuals: to their children and kindred. Few international instruments have such a potential for change in terms of the policy debate.

Already, the Convention has altered the way in which the community discusses laws pertaining to children. When Western Australia's draconian juvenile sentencing legislation, the *Crime (Serious and Repeat Offenders) Act*, was announced in early 1992, the community debate was not limited to a discussion of 'law and order', but was extended to include consideration of offending children's human rights (the Act provided for indeterminate sentencing and did not permit children themselves to apply for release). The debate extended to special considerations required for children, to fair treatment, to sentencing options that excluded detention except as a last resort, and to sentencing principles which give primacy to the child's best interests and an early reintroduction to responsible community life. The Convention on the Rights of the Child facilitated this debate, which was in sharp contrast with the kind of early penal policy that led to the 14-year-old's death by hanging to which I referred in the first paragraph of this chapter.

Ordinary Australian laws, in general, reflect their historical origins and purposes by treating children as dependent beings whose interests should be protected by specified people. These laws are generally dealt with in Commonwealth, State and Territory or family law statutes, or the inherent *parens patriae* jurisdiction of each respective Supreme Court, or by institutions of the state when families fail. There is a raft of disparate State and Territory child protection and domestic violence laws, which are designed to protect children if they are not themselves offenders against the criminal law.

International obligations

However, now that Australia has ratified a range of international human rights instruments, children, as people, are ethically entitled, at the very least, to the same human rights recognition as adults. These rights or recognitions are found in general human rights instruments, such as the International Covenant on Civil and Political Rights (1966) and the

International Covenant on Economic, Social and Cultural Rights (1966), as well as in specific conventions such as the United Nations Convention on the Rights of the Child. Such instruments protect the rights of people who are particularly disadvantaged by reason of their race, sex, illness or disability, or because they are refugees or political victims. The Convention merely affirms this protection, and also specifies some special protections, due to the vulnerability of children.

Article 17 of the International Covenant on Civil and Political Rights (ICCPR), for example, is particularly apposite for children. That ICCPR prohibits unlawful interference with a person's privacy, family or home. It is precisely that right which was infringed by the 20th century removal of Aboriginal children from their families by welfare or 'native protection' authorities. The fate of these 'round-up' children, as they were called, deprived of their families and their culture as well as their ancestral land rights, is too well documented to recite again here.

Other Articles of the ICCPR, for instance Article 23, state the obvious: that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. Article 24 (1) provides that 'every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor on the part of his family, society and the State'. Such articles are surely as appropriate for children as for their parents and community. Australia considered the ICCPR to be so important that in 1991 we ratified The First Optional Protocol, which gives people an avenue of redress external to Australian law if they believe they have been deprived of the rights expressed in this instrument.

Dolgopol (1993) points out that among the many guarantees of children's human rights to which Australia is a party the International Covenant on Economic, Social and Cultural Rights (ICESCR) specifically recognises the rights of Aboriginal children as well as adults, when in Article 1 it asserts that: 'All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development' (p.79).

Australia's obligation to comply with the human rights instruments it ratifies plays an important part in the creation of domestic policies and practices. Australia's National Program of Action for children, published by the Commonwealth Government in July 1994 (Commonwealth Department of Human Services and Health 1994), arose from its subscription to the World Declaration on the Survival, Protection and Development of Children deriving from the World Summit for Children in 1990. The National Program of Action:

> '... seeks consistency with Australia's specific international obligations to children, such as the United Nations Convention on the Rights of the Child and the International Labour Organisation Convention Number 156 on Workers with Family Responsibilities. It also recognises important linkages with major initiatives of the United Nations, such as the World Summit for Social Development in 1995.' (Commonwealth Department of Human Services and Health 1994, p.vii)

As Brian Burdekin (1991) pointed out, the World Declaration '... calls not only for the ratification of the Convention [on the rights of the child] – which Australia has achieved – but for effective implementation' (p.11). The National Program of Action itself provides that Australia's international obligations require it to develop:

> 'Strong policy linkages ... in *current and future policy development* between the Convention on the Rights of the Child and the World Declaration on the Survival, Protection and Development of Children. Together, these form Australia's two major international commitments to children and they must both be taken into account when *national, state and community policies* that relate to children are being formulated.' (Commonwealth Department of Human Services and Health 1994, p.108, emphasis added)

The Convention on the Rights of the Child is particularly significant because it has become a 'declared instrument' under the *Human Rights and Equal Opportunity* Act 1986 (Cwlth). This may have implications for the interpretation of domestic law, discussed later in this chapter. The Convention also gives rise to reporting obligations to the

United Nations (unlike the earlier Declaration of the Rights of the Child), and consolidates the human rights of children expressed in the wide range of other human rights instruments.

The framework for children's rights, that being the law which affects children (either directly, or indirectly by addressing parental or 'family' rights and duties), must in the decades to come be predicated on rights and their implementation. In a recent review of Australia's compliance with the Convention by the Children's Rights Coalition (Brewer & Swain 1993), the effect of Articles 18, 19, 32–36 and 39 (which relate to child protection as opposed to children's self-determination rights) are summarised as follows:

> 'The child has the right to protection from all forms of physical, sexual or mental abuse and from economic or labour exploitation. The State is obligated to assist parents in the upbringing of children, including the provision of child care, and the promotion of the physical and psychological recovery of child victims of abuse, neglect or exploitation.' (p. 3)

Article 4 enjoins the state (that is, the signatory state, the Commonwealth of Australia) to take all appropriate measures, specifically administrative and legislative ones, to implement the Convention. That is why, before such instruments are ratified, the consent of the constituent States and Territories is sought. As we know from the example of Tasmania's homosexuality laws, which make homosexual acts between consenting adults a crime, and Western Australia's juvenile sentencing legislation, attention needs to be paid to the potential for international embarrassment, if not condemnation, if those laws are overtly in breach of international laws; in the first case, of the International Covenant on Civil and Political Rights, and in the latter, of the United Nations Convention on the Rights of the Child.

Enforceable Australian obligations

Traditionally, Australian courts do not consider that the Convention creates enforceable legal rights and duties within this country. The Federal Parliament seems, however, to have the power to pass legislation implementing the Convention in Australian law and practice,

under its external affairs or treaties power. It has not done so except in the case of laws criminalising sexual activities with children outside its jurisdiction. (Following cases such as *Koowarta v. Bjelke-Peterson* (1982) 153 CLR 168 and *Commonwealth v. Tasmania* (1983) 158 CLR 1, the Federal Government's external affairs power (placitum 51 (xxi) of the Constitution) would probably support such legislation.)

However, the traditional interpretation seems to be well on the way out. This claim can be illustrated in the interpretation of domestic legislation and the review of administrative decisions by the High Court, the Federal Court and the Family Court of Australia. Whereas in 1985 the High Court of Australia could conclude that international instruments such as the 1950s United Nations Declaration of the Rights of the Child had no effect within Australia (*Kioa v. Minister for Immigration and Ethnic Affairs* (1985) 159 CLR 550), since that time international instruments have been used to clarify ambiguities in domestic laws. It is now seriously arguable that the incorporation of an international instrument into the schedule to the *Human Rights and Equal Opportunity Commission Act*, which was achieved in January 1993 to meet our obligations to the Convention on the Rights of the Child, might have that effect (Justice Einfeld in the Full Court of the Federal Court of Australia in *Minister for Foreign Affairs and Trade v. Magno* (1992) 37 FCR 298). Justice Michael Kirby, in a 1993 New South Wales Court of Appeal case involving the interpretation of the United Nations Convention (in *Young v. Registrar, Court of Appeal & Anor. [No.3]* (1993) 32 NSWLR 262) summarised the authorities as follows:

> 'International treaties (even those which Australia ratifies or signs) are not, as such, part of Australian law. Accordingly, the provisions of such treaties cannot be used to over-ride a clear principle of the common law or an unambiguous statutory provision. In such a clash the duty of judges of this country is clear. They must give effect to the valid law of Australia, whether expressed in legislation, or in the principles of the common law.' (p.276)

However, in the case of ambiguity, the courts should construe a Commonwealth statute in a way that is consonant with Australia's

international treaty obligations, which should be interpreted 'not as a court would approach the construction of an Australian statute, but as international law requires, and as the provision would be understood to operate in an international context'. He concluded that: 'The common law, derived from earlier cases, is often uncertain and disputable. Statutory language is often ambiguous. These features of our law leave much scope for judicial reference to international conventions, in particular where they state universal principles of international law relating to fundamental human rights' (p.276).

And this, it would seem, is precisely what is happening more often. In a 1994 decision of the Full Court of the Federal Court of Australia (*Teoh v. Minister for Immigration, Local Government and Ethnic Affairs* (1994) 121 ALR 436) (*Teoh* case), a man who was married to an Australian citizen and had seven young children who were Australian citizens appealed against a decision to deport him, arguing that he had been denied procedural fairness because the decision-maker had failed to consider the effect of his deportation on the breaking-up of his family and its impact on his children, and that the ratification of the Convention required him to do so. In this case, Chief Justice Black decided that: '... the breaking up of a family is a consideration of major significance and one which the decision-maker was relevantly bound to take into account ... [It] obviously involves a consideration of the effect of the break up on the individuals affected, especially the children' (pp.440–1).

In failing to consider this matter, on adequate evidence, Chief Justice Black found a mistake had been made. Though not quite claiming that the Convention was 'part of Australian domestic law or that the decision-maker was bound to take its provisions into account when making a decision that might affect children', he concluded that the Convention '... does however form part of the general background against which decisions affecting children are made ...' (p.443).

Justice Lee decided the case on the basis that ratification of the Convention: '... provided parents and children, whose actions could be affected by actions of the Commonwealth which concerned children, with a legitimate expectation that such actions would be conducted in a manner which adhered to the relevant principles of the

Convention' (p.449), and that 'the principles of the Convention required the "best interests" of the children to be "a primary consideration" ' (pp.450–1).

The *Teoh* case has since been the subject of a High Court appeal (unreported decision 7 April 1995). The majority of the High Court of Australia has affirmed that although a treaty cannot be a direct force for individual rights and obligations under Australian law, 'where a statute or subordinate legislation is ambiguous the courts should favour that construction which accords with Australia's obligations under a treaty of international obligation' (Chief Justice Mason and Justice Deane). Thus, the interpretation of the legislation is at least in conformity with international obligations.

International treaty obligations were used as a guide to interpretation of the common law in *Mabo v. State of Queensland [No.2]* (1992) 175 CLR 1, 42 (*Mabo*). In principle, the Convention on the Rights of the Child may be used as the foundation for generating a legitimate expectation that its provisions require conformity with procedural fairness requirements, and that Australia's international obligations will govern the relevant considerations to be weighed by the administrative decision-maker.

In *Tavita v. Minister for Immigration* [1994] NZLR 97, a case involving the deportation of a parent of a New Zealand citizen, the New Zealand Court of Appeal has similarly concluded that the Executive should not ignore international human rights norms or obligations when exercising discretionary powers accorded by a domestic statute, even if the latter does not mention those norms or obligations. The Court suggested that:

> '... an aspect to be borne in mind may be ... that since New Zealand's accession to the Optional Protocol [to the ICCPR] the United Nations Human Rights Committee is in a sense part of this country's judicial structure, in that individuals subject to New Zealand jurisdiction have direct rights of recourse to it. A failure to give practical effect to international instruments to which New Zealand is a part may attract criticism. Legitimate criticism could extend to New Zealand courts if they were to accept the argument that because a domestic statute giving

> discretionary powers in general terms does not mention international human rights, norms or obligations, the executive is necessarily free to ignore them.' (pp.106–7)

Though courts are cautious in introducing the influence of international conventions, and Justices Mason and Deane in the *Teoh* case said they should be, it is now apparent that a person can have a 'legitimate expectation' that the principles of international human rights instruments will be respected in domestic decision-making. The potential for affecting, in a very real way, decision-making which affects children's rights both directly and indirectly, and particularly their rights not to be separated from their parents, is enormous. The Commonwealth Government is considering a legislative response to the *Teoh* decision which may limit its effect.

Children's rights as a benchmark

It is not, of course, just the interpretation of legislation which is affected by the United Nations Convention. It sets benchmark obligations to which State and Territory governments and the Commonwealth Government agreed to be bound before it was ratified. Consequently, these governments each purport to believe that children and family interests have priority over other interests; however, there are manifest problems in putting that belief into effect in a meaningful way across eight State and Territory jurisdictions, each with their own unique geographical, local, cultural and financial concerns. Tensions between federal and State and Territory governments make the ownership of international obligations a political issue of some complexity. Nonetheless, Australia, and its constituent parts, is bound by these obligations.

These obligations raise significant issues for the development of public policy, legislation and institutions which affect children and their families. Two particular instances usefully illustrate where the fundamental rights of children, expressed in human rights instruments, are infringed in current Australian laws and practices: adoption practices, and the practice of reproductive technology.

It is universally agreed, in the 1990s, that the relatively recently abandoned practice of removing Aboriginal children from their

61

natural and extended families and depriving them of their cultural heritage was a very great wrong, and that sending poor and disadvantaged children to 'the colonies' in well-intentioned settlement schemes of the 20th century was also wrong. Yet in Australia's current adoption laws and practices, and in the practice of reproductive technology (especially that which uses donated gametes), we have also, equally unintentionally, damaged the rights of the child as they are expressed in the United Nations Convention on the Rights of the Child.

The idea of adoption, at least in the way Australian laws have come to regulate it, came from the law of property. Its purpose, in the early European settlement history of Australia, was less the care of an unprotected child than the assurance that there would be an heir to inherit property on the death of its present holder who had no such heir. Abandoned, destitute or unmaintained children might be 'boarded out' or informally adopted, like Albert Facey who, born to a poor family, was sent away to work as a child labourer (Facey 1981). In essence all that was required was that the adopting couple accept financial responsibility for the child; there was no need for a formal, legitimising procedure.

The first formal adoption legislation in Australia required parental consent, not the child's assent (Boss 1992). It created a legal fiction of parental status for the adopters, and severed the original tie between the biological parents and child. In many respects this was a 'child welfare' policy, because most adopted children were the ex-nuptial (then called 'illegitimate') children of single mothers; children who were heavily stigmatised by the circumstances of their birth and outside the pale of a recognised family. These children were placed by the informal welfare workers of the time – doctors, priests and ministers of religion – and most of the time the adopting parents had a good idea of the child's biological parenthood. The child, however, did not, and it was not early practice to assert the truth about the child's biological origins.

Gradually the state came to be more and more closely associated with adoption arrangements; in part, because of scandals about 'lying in homes' where mothers went to give birth and baby farms where children died if not by violence then by neglect. Eventually similar,

though not identical, adoption laws were introduced across Australia (drawn from a model adoption bill adopted by the States and Territories in the 1960s). These have been refined over the years, and in the 1990s enable a process of flexible, open adoption which more closely reflects modern attitudes to ex-nuptial children.

Adoption laws now provide much greater access to identifying information about children and parents, and mechanisms for making contact. They are not, however, without problems when judged against the guarantees of 'rights' contained in the Convention on the Rights of the Child. Articles 7 and 8 of the Convention require that the child have the right to acquire an identity and a nationality. A child who is the subject of an open adoption may have a confusion of identities arising from having both biological and adoptive parents. A child who has been separated from his or her parents might have a 'right' to make contact under these laws with the relinquishing parent, but not until they have ceased to be a 'child', at the age of 18.

Arguably, the right recognised by law to information about and possible contact with the biological parent is not the child's right but the right of an adult, and thus a right of which the child has been deprived during his or her minority. Article 9 requires that a child not be separated from his or her parents without the child's consent, and then only when the child's best interests require it. But very young children cannot consent, and in some jurisdictions the putative father's consent is not required to an adoption order either. Article 12 guarantees the child's right to express an opinion and be heard in any matter affecting the child, but this is not secured in Australian domestic legislation. One might legitimately ask whether there is any point in ascribing rights to children which, as *children*, they cannot exercise or enforce.

The concealment of both formal and informal adoption in past generations has become apparent as the new adoption laws of the 1980s and 1990s strike home and lost children and bereft parents seek each other out. The children born as a result of reproductive technology are equally vulnerable to a range of rights infringements, the possibility of which has not been thought through. In recent times the feeling of sadness and lack of fulfilment arising from childlessness has

increasingly come to be expressed in terms of the rights of individuals to have children. This has been one of the driving forces behind religious and ethical movements, and professional groups concerned with the interests of childless adults. For further discussion of adoption and the application of the Convention in Australian law and policy, see Brewer and Swain (1993) and Swain and Swain (1992).

There are many interest groups concerned with the rights of adults, and the ethical issues about the propriety of use of In Vitro Fertilisation (IVF) technology on women or for research purposes. There are not, as yet, many interest groups as dedicated to ensuring proper identification and consideration of the rights and needs of people conceived by artificial means. Modern technology has made it possible for such people to have four or five 'parents', some of whom could have been dead before the children were conceived: the genetic donating parents; the surrogate mother and social or nurturing parents; and even, if the latter couple's relationship breaks down, the substitute or new or re-partnered social parents. This could be confusing and troubling to the most stable of individuals.

The first right of any child is found in Article 6 of the United Nations Convention. This specifically recognises that 'every child has the inherent right to life' and requires signatories to 'ensure to the maximum extent possible the survival and development of the child'. But among the other human rights recognised by the Convention are rights which very clearly identify the rights of children brought up by those who are not their 'natural' or biological parents.

Article 7 requires that a child be registered immediately after birth and have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents. Article 8 requires signatories to 'respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognised by law without unlawful interference'. Each of these articles has implications for children born as a result of sperm or embryo donation, where the child is conceived with the intention of separation from one or both of the biological parents.

Though I draw some parallels between the experience of children born as a result of artificial conception procedures and those who are

adopted, at least with regard to access to information about their biological origins, it is probably not appropriate to draw too close a parallel. Both create social or legal bonds of obligation and rights between children and non-biological parents or carers. There are, however, significant differences; adopted children are not, for example, necessarily brought into the world for the purpose of separation from their biological parents. Further, the right protected by the Convention goes beyond the right to know who one's biological parents are, or were. It is a fundamental human right to *know* and *to be brought up by your own parents* (Article 7).

Potential parents cannot be vetted for their future capacity as parents, though the effects of child abuse and neglect are painfully familiar. Great harm can be done, however, by separating children from their parents – be they good, good enough or inadequate – and seeking to raise children in an environment isolated from their cultural or familial context. The damage done by well-meaning people in the name of the child's 'best interests' affected not only Aboriginal children taken from their parents, but 'needy' children – disadvantaged children in the care of welfare institutions – who were exported as 'farm-fodder' from welfare institutions in Great Britain to Australia and other countries of the British Commonwealth. Frequently these children were told that their natural parents were dead, or they otherwise lost contact with their families. This led to the personal misery of many children lost in foster care.

The right to an identity

Although Aboriginal people who were part of the 'stolen generation' of children – removed from their natural parents and adopted when adoption was a closed process – have done much to draw attention to these practices, such tragedies are not easily remedied. We have, however, an ethical as well as international obligation to take every step possible to prevent them from happening again. One matter we have learned from adoption is the effect on children, once born, of uncertainty about their origins. The closed process of adoption not only severed the legal tie between biological parent and child but deemed it never to have existed. Adoptees had no access to their adoption papers

and, even today, their privacy and that of the relinquishing parent(s) is still protected in a range of ways. Subsequently, the status of adoption during that period carried a stigma not much less than that of the 'illegitimacy' which so often led to it.

Open adoption has now almost become the norm in the changes to adoption laws during the last decade in Australia. These changes came about and were influenced in a variety of ways. It was found, for example, that considerable pressure was placed on adopting parents who could not tell their children anything about their natural parents (often because they did not know the details themselves); that relinquishing parents, mothers in particular, had no way of coming to terms with their feelings because of the way in which the process was conducted; and that the children themselves and their families, were disadvantaged by being unable to determine their genealogical backgrounds and genetic inheritances, or obtain reassurance that there was nothing about 'them' which had led to their being adopted out in the first place (Boss 1992).

These contemporary laws have tried to soften the impact of the disclosure process by establishing registries, adoption information agencies and limits to protect the privacy of those who do not want to be reminded about the past or to have their secrets exposed, and counselling for those who make adoption decisions or seek to establish contact with their biological families at a later stage in their lives. Proposals for public inquiry into the removal of Aboriginal children and attempts to reunite these 'children' with parents or extended family, and examination of adoption procedures (NSW Law Reform Commission 1994), are welcome signs of ethical and legal sensitivity.

There is, however, some parallel between successful outcomes of artificial insemination and adoption, because many such children are raised by other than their biological parents, and because both groups are in a situation where significant adults in the child's world have information about that child which they have the power to share or withhold. This raises an important issue about families, children and adult responsibilities. As well as 'rights', there is another fundamental reason for ensuring that a child knows – really knows – their parents. The secrecy which usually accompanies present-day artificial

conception processes is at odds with the general ethical principles that require our family and kinship roles to be based on honesty and trust.

In general, there is at least agreement that children of adoptive and reproductive technology processes should have access to non-identifying information about their biological parents. There is, however, a massive leap from this to specific information about *the* person who is, or was, the child's mother or father in biological terms. It is scarcely a *child's* right to be told that they can attempt to trace this once they are adult; for this is then not a child's but an adult's right. There are major practical and social problems with retrospective legislation that would give children such rights as adults, or give them those rights at all. Those affected by the various new laws about contact between adoptive and relinquishing parents and adopted children, introduced in different States and Territories of Australia over the past decade, speak of these dilemmas (Swain & Swain 1992).

There is an important, ethical principle here: the greater the degree of intervention by adults, the professions or the community (in providing resources), the more responsibility must be taken for a child whose life, lifestyle and life choices are affected by those interventions. A child is not the prize at the end of an expensive and often stressful process that might lead to a child's birth or adoption. The child is a human being with extra moral claims on the adults who made the life choices that determined the mode or measure of the child's existence.

Policy implications of the Convention on the Rights of the Child

Finally, let me turn to the policy implications of ratifying, and incorporating into the *Human Rights and Equal Opportunity Commission Act*, the United Nations Convention on the Rights of the Child. Jan Carter (1993, p.256) recently defined four sets of contemporary ideologies or beliefs which have shaped Australia as it is today and are the framework for rights talk: *the assumptions and values of neo-conservative economists*, which give prominence to the market forces, private sector activity and economic efficiency in all social policy circumstances; *social corporatism*, which combines the powerful interests of government, labour and capital in the interests of economic growth, excluding less

powerful interests as peripheral to the aim of addressing the traditional goals of a welfare state through the consensus of the main players; *social justice values*, which promote the value of redistribution to reduce inequality; and the development and growth of *human rights* perspectives on social and economic policy, which require equal opportunity and the implementation of economic and social rights for all, not as a matter of social justice, but as a matter of principle.

The rights of children are not the basis on which services for them are now planned, monitored or delivered. The needs and priorities of three levels of government in eight jurisdictions and with different political or ideological bases, have all affected access to services for children differently across Australia. 'Rights' or universal entitlements or even individual need, are not the basis of administrative eligibility requirements for services like child care, education, housing and health care. Access may be limited on other bases, such as ability to pay, family relationships or complex qualifying criteria. Judged by the human rights standards of the Convention, the failure to provide universal services for children is a breach of the Convention. If courts can be aware of the rights claims of children in administrative, family and criminal jurisdictions, policy makers at every level should be equally aware of the Convention. The Children's Rights Coalition review previously referred to, of Australia's compliance with the Convention in 1993, found that there was an abysmal ignorance of those standards by policy makers throughout Australia. On that basis alone the Commonwealth has failed to promulgate the Convention as it should have done. There would seem to be a need for the Commonwealth to act promptly to address its own deficiencies.

Children as part of the community

When Australia was first settled by the early European colonists of the 19th century who came to exploit its massive open spaces, its land and its sparse population, the continent was seen as an empty land meant to be dominated and tamed. There was no understanding of the special relationship Aboriginal people had with it, nor of what these European settlers were doing in imposing 19th century colonial ideas of ownership, possession, exclusion and assimilation of not only the land

but of its people, its flora and its fauna. Australia's European forefathers and mothers did not establish – and this we need now to find – their, and hence our own, relationship with the land and with ourselves.

Veronica Brady (1994) suggests that, in the aftermath of the High Court's *Mabo* (1992) decision, we have a unique opportunity to remake Australia:

> 'The High Court's rejection of the notion of *terra nullius*, which served as the legal justification for our occupation of the country, also calls into question our ideas of space as an emptiness waiting to be filled ... space has an inner as well as outer dimension. Properly speaking ... there is no outer without inner space, without some transformation of physical fact into psychic reality. It is precisely its strength that traditional Aboriginal culture made this transformation and established an equilibrium between the two spaces, so that, for thousands of years, people and land lived in symbiotic and mutually supportive relationship.' (pp.14–15)

We need to come to terms not only with the land and its original owners, but with those within that inner boundary of the family in which we huddle and seek comfort together. We must also look outward to the community, which must take responsibility for ensuring that the family fulfils its proper role of providing an atmosphere of love and understanding within which a child may grow and step beyond. The only way in which this may be achieved well is on the basis of universal human rights for all human beings.

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4
Children's Rights and Family Law

John Faulks

'Suffer the children ...'
Mark 10:14
Luke 18:16

In 1962, in the Court of Appeal in the United Kingdom, the then Master of the Rolls Lord Denning was able to say:

> 'If the mother in this case were to be entitled to the children, it would follow that every guilty mother (who was otherwise a good mother) would always be entitled to them: for no stronger case for the father could be found. He has a good home for the children. He is ready to forgive his wife and have her back. All that he wishes for is her return. It is a matter of simple justice between them that he should have the care and control. Whilst the welfare of the children is the first and paramount consideration the claims of justice cannot be overlooked.' (*Re L. (Infants)* [1962] 3 All ER 1, 4)

In the period up to the introduction of the Commonwealth *Family Law Act* in 1975, many of the statements about how to determine questions of family law related to children were couched in terms which were designed to suggest that their interests were paramount. However, the way in which these rights were examined and the setting in which they were examined (that is, by almost invariably male, middle-aged to elderly judges from middle and upper class backgrounds and intact families) led to a broader consideration of parental rights rather than any acknowledgment of children's rights. In fact, except for the abstract expression that a child's welfare should be the paramount, or the 'first

and paramount' consideration, most jurists, lawyers and indeed parents, would have been somewhat startled 30 years ago to discover that the children who were subject of the proceedings had rights.

Just how far the emphasis has changed is illustrated by the wording of the *Family Law Reform Bill* 1994, which will become law in 1996. The amending act refers to the United Nations Convention on the Rights of the Child (the Convention), which sets out specifically the rights a child has in relation to its parents and, by inference, in relation to family law (Section 31 of the Bill numbered at this stage Section 60B of the Act). The aims of Part VII of the amended Act are: '... to ensure that children receive adequate and proper parenting to help them achieve their full potential and to ensure that parents fulfil their duties and meet their responsibilities concerning the care, welfare and development of their children.'

This chapter examines how this change has come about in judicial reasoning to the point where the proposed new formulation of Part VII of the *Family Law Act* 1975 is not regarded as highly controversial and has received bipartisan support.

In the march down the path towards a greater recognition of children's rights, the Family Court of Australia has reached a point where it has prescribed circumstances in which a child or children should be separately represented. However, is such a representative a conduit for the child's opinions? Is such a representative a separate and individual expert who will provide another opinion to the Court? Or is such a representative simply a friend of the Court who is there to correct imbalances generated by the adversary system itself? This issue is also examined in this chapter and suggestions are made about the best use of the facilities available to us to enhance and develop the rights of children in a system of justice conceived and in the process of development some hundreds of years ago.

To illustrate the transition set out above, and also to examine the question of children's rights and the rights of those associated with them in family law, the concepts of guardianship, custody and access as they have developed in Australia, particularly since the introduction of the *Family Law Act*, are considered. The chapter also examines the growing welfare jurisdiction of the Family Court with particular

reference to the Court's involvement in the authorisation of medical procedures for children. At the outset however, there is a factor which needs to be considered to set a context.

An end to litigation?

Court proceedings about children usually take the form of a massive decision-making intervention at one particular point designed to determine the whole of the child's future, although in some cases several interventions may be made as the parties face new crises and are unable to resolve them appropriately. In this context the child and its circumstances as they are perceived, or found to be by the Court, are subjected to a careful examination and, from that comparatively narrow base, decisions are made about the future that will significantly affect the continuum of the child's life and welfare.

Social scientists argue that it is inappropriate to have such a once-only, massive intervention and that interventions should be less massive and possibly more available to resolve occasional conflict. In part, such an approach is recognised in the amendments to the *Family Law Act* (see Sections 61C and 61D). The amendments indicate that the Court will intervene only when it is necessary to do so, and then to the minimum extent required. This is a substantial departure from the previous principle that it was necessary for one parent to be nominated to have a 'casting vote' in relation to a child's or children's welfare.

Prior to these amendments, the Family Court, following the prescriptions of the *Family Law Act*, looked to two principles to resolve disputes. The first of these was that litigation should be minimised and that the Court should: '... make the order that in the opinion of the Court, is least likely to lead to the institution of further proceedings with respect to the custody or guardianship of the child ...' (Section 64 (1) (ba) *Family Law Act* 1975).

It has also taken the view that pragmatism dictates, as Justice Emery said in the case of *Diason and Diason* (1976) FLC ¶90026, 75,119 that: '... where the parties have separated, particularly because of serious incompatibility, then it will be difficult for them, as a committee of two, to reach a majority decision.'

In line with this decision, the Court has therefore taken the view that the appropriate way of resolving disputes is to give the future power of resolution to one of the parents over the other.

The effect of language on conflict

The second matter that must be borne in mind in a consideration of these issues is the question of language. Lawyers are concerned about, and pride themselves on, their ability to resolve disputes but consider that this is possible only in a context of justice. Much of their language is directed to questions relating to justice and to ensuring that all available information is elicited to permit the judge/arbitrator to make a determination about where rights (or wrongs) may lie.

Social scientists (in which category are included counsellors, psychologists, psychiatrists and carers of different sorts), on the other hand, are not so concerned with the rights and wrongs of a conflict, but rather with the people in conflict and with providing a process which will enable that conflict and other conflicts to be resolved. The language of social scientists has more to do with feelings and processes than with rights, resolutions, and the concept of justice.

This incompatibility of language has led to misunderstandings when the two disciplines work together to find a way of dealing with a crisis in the life of a child and its parents, as is often the case in the context of Family Court proceedings. Having discussed the factors which should be considered in a family law context, the following discussion will move on to the major issues raised in this chapter.

Custody

In any marriage breakdown involving young children, the children become the focus of parental affection and attention in an intense and perhaps not previously observed way. In a perfect world, no doubt, parents of children, though separating from one another, would do their best to ensure that the children receive unqualified, continuing affection. Every opportunity to enhance parent–child relationships and contact would be taken, with parents setting aside their differences and uniting – at least on matters relating to the children – for the children's common good. The fact that this does not happen on a regular

basis is of no surprise to those who work and care in the area of family law. This is not a matter for the attribution of blame, but rather a recognition of human nature and the deeply wounding effects of a failed marriage.

The compounding of conflict between parents with issues relating to their care of children has, for a very long time, led to battles about custody. One of the earliest recorded examples of a judgment made about custody is that of Solomon (Kings 1:16–30). Solomon's methods for resolving the dispute were, by modern standards, crude and barbaric. He, in his wisdom, recognised that a mother's love for her child would prevail over any personal gain or selfishness to preserve the safety of that child. Nowadays, it is unlikely that many would agree that the end justified the means, and it could not be suggested under any circumstances that what the Americans call 'due process' occurred.

In the example of Solomon, both women wanted custody, but only one was prepared to put the welfare of the child first. The complex and multi-layered issues involved in any custody dispute, makes this area of family law one of the most difficult. The proposed amendments to the *Family Law Act* tackle some of the complexities by shifting the emphasis in language away from concepts of ownership towards the rights of children. It is the beginning of a recognition of the difficulties generated by the language used by lawyers and others in this area.

The language of custody

At common law, the term 'guardianship' was generally used to signify the totality of rights and powers which an adult had over a child. In other words it included the rights and powers which are generally associated with 'custody'. Guardianship was commonly the term applied to the appointment by Will of someone to operate in place of a parent upon the death of that parent. Under the *Matrimonial Causes Act* 1958 (Cwlth), and in fact under the *Family Law Act* 1975 until amended in 1983, the term most commonly used to describe the bundle of rights associated with determining major matters relating to a child's welfare was 'custody'. It was possible for one person to have custody while another had 'care and control' of the child.

Initially, it would appear that custody orders made by courts were based, at least in part, on the proposition that an 'innocent' party should not be deprived of the custody of his or her child. The courts in England found this division of responsibility to be 'entirely realistic'. In *Wakeham v. Wakeham* [1954] 1 All ER 434, 436, Lord Justice Denning (as he then was) said:

> 'By giving the father the custody, it recognises that he, the innocent party is at least entitled to a voice in the bringing up of the child or children, and also to the consideration of the Court when any question arises as to what is to be done for the child. The paramount, but not the only consideration when the Court comes to consider the matter is, of course, the welfare of the child, but the father's views are also entitled to consideration, that is why the order for custody should be given to him, although for solely practical reasons, the mother may have the care and control.'

This curious dichotomy, born of a different age and arising from proceedings in the court centred on fault, was later criticised on the basis that there should not be responsibility without power. Justice Barber, in deciding against a divided order in *Travincek v. Travincek* (1966) 7 FLR 440, 444, said:

> 'Practical experience in the matrimonial jurisdiction leads to the conclusion that any separation of the responsibility of the child's upbringing and the authority to control it would in most cases end unsatisfactorily and in some cases disastrously. The ultimate test to be applied must always be the welfare of the child and the custody of the child is not to be committed or refused to one party or the other as a reward for virtue or penalty for matrimonial guilt. It is also necessary to resist the temptation to console the successful petitioner by an order for legal custody where the circumstances are such as to require the actual care and control to remain with the respondent.'

Justice Barber went on to say: '... it seems to me essential that the party with the actual responsibility for the child's care should also have the legal right and duty to control and direct its mode of life, education

and general upbringing, subject to a reasonable consultation with the other spouse, and ultimately, if necessary, to the control of the court.'

The Full Court of the Family Court of Australia in the decision of *Chapman and Palmer* (1978) FLC ¶90–510 referred to comments by Justice Barblett in *Money and Money* (1977) FLC ¶90–284, that it is important that one of the parents should have the power of decision to avoid having to ask the Court to arbitrate on every matter. Nevertheless, the Full Court said that it was wrong to approach the problem from the point that a joint (shared) custody order should be made 'only in the most exceptional circumstances' (p.77,672). In that decision he awarded joint custody.

A more recent example of the Family Court's present pragmatic approach to the division of the elements of custody and guardianship is in the matter of *Padgen and Padgen* (1991) FLC ¶92–231 where Justice Rowlands declined to make an order for joint custody notwithstanding the parents' geographical proximity, their compatible parenting values, the adaptability of the child and the ability of both parents to supervise him, because he found that: '... unhappily there is some rift in mutual trust, co-operation and good communications at present, as these very proceedings demonstrate' (p.78,585).

Notwithstanding that purists might have different views about the possibility of splitting elements of child care (be they called 'guardianship', 'custody' or 'care and control'), both under the *Matrimonial Causes Act* 1958 and the *Family Law Act* 1975, most parents have had little difficulty in knowing what they wanted. They were clear that they wanted custody of their children.

However, this was to change with the Watson Report (Family Law Council 1982) and the implementation of that Report in the *Family Law Amendment Act* 1983 which renumbered Section 60A to Section 63E and in that section renamed the common law notion of care and control as 'custody', and called the remainder of the common law notion of custody and all of the common law notion of guardianship, 'guardianship'. Section 64E (2) which is the law at present (until it is changed by the amending legislation in 1996) states that: 'A person who has or is granted custody of a child under this Act' has '(a) the right to the daily care and control of the child; and (b) the right and

responsibility to make decisions concerning the daily care and control of the child.'

By way of contrast, Section 63E (1) says in relation to guardianship: 'A person who is the guardian of a child under this Act has responsibility for the long-term welfare of the child and has, in relation to that child, all the powers, rights and duties that are apart from this Act, vested by law or custom in the guardian of a child' other than '(a) the right to have the daily care and control of the child; and (b) the right and responsibility to make decisions concerning the daily care and control of the child.'

While, in general, not much turns on the distinction, it is interesting to note that under Section 63F (1): 'Each of the parents of a child who has not attained 18 years-of-age is a guardian of the child, and the parents have joint custody of the child.'

It is to be noted that the Act does not confer joint guardianship which would appear to require cooperation on day-to-day matters (joint custody), but entitles each parent to independently exercise his or her right as guardian. In practice, most people seem to treat the statutory appointment of each parent as guardian as producing a joint guardianship situation. (Compare, however, the warning given by the Full Court of the Family Court of Australia in *H v. W* (1995) FLC ¶92–598, about an assumption of joint guardianship.)

While the concept of 'access' has not changed, it should be noted that in many cases, particularly where access continues beyond a few hours, it is probably more apposite (under existing legislation) to describe the time that the child spends with that parent as 'custody' to conform to the definition of that term. One effect of the 1983 amendments was to generate some confusion in the minds of litigants as to what in fact they wanted. Some parents now settle for 'custody' who would never have settled for 'care and control' (which for all practical purposes was the same thing) prior to 1983.

In any event, these subtle differences become a thing of the past with the new amendments to the *Family Law Act*. Among other things, the 1995 amendments do away with the proprietorial terminology inherent in 'guardianship', 'custody', 'care and control' and 'access'. While these are terms which have become familiar over the

years, they connote ideas of ownership and of rights of parents to children rather than of continuing relationships between children and parents. The term 'access' itself would seem more appropriate to describe entering onto property rather than a means of establishing a proper relationship between parent and child.

Part of the thinking about custody and access (it is proposed to use those terms hereafter without making the fine distinctions inherent in the legislative changes in 1983) is brought about by the nature of the proceedings in which claims for custody or access were brought. Under the *Matrimonial Causes Act* children could not institute such proceedings themselves, whatever their age, and custody applications could only normally be brought as part of the petition for divorce. This inevitably associated questions of custody with the grounds for divorce, and on occasions no doubt gave rise to concepts of awarding the children to innocent parties. As interlocutory (provisional) applications for custody could not be commenced until proceedings for divorce had been instituted, hence, if no grounds for divorce (hence fault) existed, no application could be made. Interim applications for custody were instituted because of delays in final hearings for custody which might not be heard for some time after the filing of the initial application.

While the potential for confusion (fault/no-fault) existed in the transition from the *Matrimonial Causes Act* to the *Family Law Act*, the principles relating to interim custody have in fact been kept clear. In essence, the principles set out in *Cilento and Cilento* (1980) FLC ¶90-847 have been maintained and thus, unless there is a serious risk to the physical or moral wellbeing of the child, the child will not be taken from the parent with whom it lives pending the hearing. This, of course, is always subject to the overriding consideration of the welfare of the child. The decision of *Holland v. Coberoft* (1980) FLC ¶90-865 applies this principle equally to an ex-nuptial child.

Welfare of the child as paramount consideration

Section 64 of the *Family Law Act* 1975, amended in 1983 to codify the matters the Court must take into account, stipulated that the first matter, indeed the paramount matter, that the Court must take into account was the 'welfare of the child'.

The wording of Section 64 (1) (a) has a long history mirroring as it does Section 85 of the *Matrimonial Causes Act* 1958. That section in turn, it would appear, had been inserted deliberately with knowledge of High Court decisions such as *Storie v. Storie* (1945) 80 CLR 597 and *Lovell v. Lovell* (1950) 81 CLR 513 (as was suggested by Toose, Watson and Benjafield 1968, para. 729).

The words 'first and paramount' had had previous usage both in England and Australia, but a number of decisions held that no change had occurred because of the deletion of the words 'first and'.

In *Priest v. Priest* (1963) 9 FLR 384, Chief Justice Herring remarked that: '... the fact that the interests of the child are to be the paramount consideration does not mean that his welfare is to be the only consideration. The very use of the word "paramount" shows that other considerations are not excluded. They are only subordinated.'

This gives rise to the interesting speculation as to how the other matters to be taken into account were included in Section 64 by the amendments in 1983, 1987 and 1991. Logic suggests that the other matters set out in Section 64 are but different aspects of what might be regarded as 'the welfare of the child'.

The words 'the welfare of the child' are different from the words used in a similar context in the Convention on the Rights of the Child, where the phrase used is 'best interests of the child'. To emphasise conformity with the Convention, the Family Law Council suggested to the Commonwealth Government that this phrase should now replace 'welfare of the child' in the *Family Law Act*.

It is interesting to note in Section 85 of the *Matrimonial Causes Act* proceedings with respect to the custody, guardianship, welfare, advancement or education of the children of a marriage, where '(a) the court shall regard the interests of the children as the paramount consideration ...'. While there was some dalliance with the symmetry of contrasting the child's interests with the parents' interests (and hence moving to the point where the child's interests were to be regarded as paramount), there is consensus that the word 'welfare' has the same practical meaning in Section 64 as the term 'interests' did under the *Matrimonial Causes Act* 1958. For this reason, a further change in the *Family Law Reform Bill* 1994 should not suggest

that the test of the paramountcy of the child's interests be watered down.

Children should be heard, not just seen

Section 64 (1) (b) of the *Family Law Act* 1975 directs the Court to take account of 'any wish expressed by the child in relation to the custody or guardianship of, or access to, the child, or in relation to any other matter relevant to the proceedings'. The Court is directed to give those wishes such weight as the Court 'considers appropriate in the circumstances of the case'. How are these wishes to be ascertained? On the judge's knee, as was sometimes the case under the *Matrimonial Causes Act*; in counsellor reports; by separate representatives? One of the arguments put forward for the change apart from conformity with the Convention is that the Court has a separate jurisdiction relating to the welfare of the child. This has become known as the welfare jurisdiction of the Court and is dealt with later.

Under the *Matrimonial Causes Act* 1958 it was common for a judge to interview a child in Chambers. This practice has been decried in more recent times and replaced (Section 62A FLA) with the obtaining of a report from a Family Court Counsellor, who interviews parents and other people as well as the children with a view to obtaining a balanced and hopefully accurate assessment of the child's wishes.

However, in general terms the counsellor is available to be tested under cross-examination as to what occurred and why conclusions were reached, in a way a judge could never be under the old system. The counsellor is faced with precisely the same dilemma as the judge in respect of what to do about the wishes of children who want confidentiality, particularly in relation to their parents. If the judge or counsellor does not reveal these wishes but makes a decision 'consistent' with them, how can this decision-making process be tested?

'Once only' interventions

It is interesting to note that while Section 64 (1) (ba) of the *Family Law Act* 1975 obliges the Court to make such decision as is least likely to lead to the institution of further proceedings, this 'once only' intervention proposition may in fact operate to the disadvantage of the

child. While it has always been clear that a new application for custody could be made if circumstances changed, it was equally clear that the Court discouraged serial applications because continuing litigation, apart from being financially disastrous for the parties, was unlikely to assist the welfare of the children. Nevertheless, the current emphasis in the Act on a once and for all determination is a curious way of dealing with a continuing and evolving human relationship.

The 1995 amendments to the *Family Law Act* would require the Court to consider whether, in all the circumstances, to make no order is in fact appropriate. This to some extent de-emphasises the 'once only' intervention proposition and accepts, at least in theory, that the evolving relationship may require adjustment from time to time regarding specific issues upon which the parents may quite legitimately differ.

The present emphasis on determining who is to have the casting vote puts a premium on collecting all potential and present areas of conflict and making an attempt to resolve all those conflicts by deciding which parent, according to what is known, is more likely to do a good job of dealing with these matters. If it is accepted that there will be conflict from time to time and that both parents continue to have responsibility for the children and duties towards them, the issue to be determined is not who is to prevail but rather how the particular conflict is to be resolved.

For example, one area of conflict has been the difficulty some parents have in determining what is to be the appropriate education for their children. We may well ask whether this is an issue relating to guardianship or custody under the present law, and whether, in fact, this is not principally a matter of money rather than a matter of parental duty or right. It is common in the resolution of this problem to see it as being an aspect of the question of custody/guardianship and that, accordingly, the issue will be resolved by determining who will have the custody/guardianship of the child.

If neither party felt vulnerable about the broader issues of custody it may be that a simple procedure could be applied to determine that specific issue (called under the 1995 amendments a 'special purpose order') without the expense or acrimony presently associated with

comprehensive custody proceedings. It should be noted here that the child is not a party in the Family Court proceedings; it is the parents who are the parties.

Section 64 checklist

The remaining matters set out in Section 64 (1) (bb) appear to be only specific examples of factors which should be considered in determining what is for the welfare of the child. To some extent they represent a checklist of things that need to be put before the Court in order for it to determine who is the more appropriate person with whom the child is to live predominantly. They might reasonably be summarised as follows:

(1) the nature of the relationship of the child with each parent;
(2) the effect on the child of any separation;
(3) the desirability of any change in the existing arrangements;
(4) the attitude to the child and responsibilities and duties of parenting demonstrated by each parent;
(5) the capacity of each parent to provide adequately for the needs of the child including emotional and intellectual needs;
(6) the need to protect a child from abuse;
(7) any other fact or circumstance that in the opinion of the Court the welfare of the child requires to be taken into account.

The importance of Section 64 (1) (bb) is that it provides an agenda for custody proceedings, and hopefully directs the minds of the parents and their representatives to the issues which they must agree are relevant and important in determining questions of welfare.

It is useful to note that in determining what is in a child's best interests ('welfare') the *Family Law Reform Bill* 1994 gives the Court a list of matters (Section 68F (2)) which, expressed in more modern language, are for all practical purposes identical with the list set out in Section 64 and summarised above. It is to be noted, however, in keeping with more recent thinking about the effects of violence on children (even if that violence is not directed expressly against them) that the list

should be taken into account with the following additional headings: 'Any family violence involving the child or a member of the child's family'; and 'Any family violence order that applies to the child or a member of the child's family'.

Access

In Australia, the term for the time a child spends with a non-custodial parent is 'access'. It contrasts with the American term 'visitation' and is replaced under the Reform Bill with the word 'contact'. The language is important because 'access' carries with it some connotation of rights of entry to real estate or of ownership, rather than of the time in which two people might continue and develop an intimate relationship. To the extent that a change in terminology may effect a change in the way in which people look at the issue, the term 'contact' is desirable.

The term 'access' is used here because it is that used in the cases about to be considered. Access illustrates the development of the concept of children's rights out of parental rights. The older view about access is demonstrated by the following comment by Lord Justice Wilmer in *S v. S and P* [1962] 2 All ER 1, 3–4, where he said that: '... access is no more than *the basic right of any parent*' and that 'the Court should not take the step of completely depriving a parent of access unless it is shown that such parent is not a fit and proper person to be brought into contact with the children at all' (emphasis added).

Perhaps one of the more humane statements of the principles relating to access was made by Justice Nygh in *Cotton and Cotton* (1983) FLC ¶91–330, where he said:

> '... it is desirable for a child to maintain a meaningful relationship with each of his or her parents. That is obviously desirable when the parents are living together in a united household, but is becomes even more desirable when the parents are separated. It is a trite observation that the parties to a marriage may divorce one another, but they can never divorce themselves from their children. In that sense, the parties remain tied to one another, at least, until those children can stand on their own two feet, which may not necessarily occur at 18 years-of-age or 21 years-of-age.

> However, that desirability only operates where there is a chance of a meaningful relationship which is beneficial to the child. It is not, in other words, a question of contact for contact's sake. If there is a situation where contact with a parent is unbalanced, likely to cause more harm to the child than good, or even is not likely to confer any benefit, then little purpose is served by this Court making orders for such contact.'

The leading authority, the Full Court decision in *Brown and Pedersen* (1992) FLC ¶92–271, p.79,011 referred approvingly to those remarks and added 'proceedings for custody or access are not to be viewed as adversary proceedings ... but as an investigation of what order will best promote the welfare of the child'.

With respect to their Honours in *Brown and Pedersen*, most participants in custody cases will be somewhat bemused to learn that what they are engaged in should not be viewed as adversary proceedings. While no-one would quibble with the judges' sentiments, it is somewhat unrealistic to expect that people who are engaged in the most difficult and emotional litigation known would do so in a spirit only of promoting the welfare of the child. It is in part to remove the stigma associated with the loss of the right to *control* that the amendments to Part VII of the *Family Law Act* have been introduced.

It has been suggested previously in this chapter that in some cases the difference between access and custody is more apparent than real. Indeed, some judges quite properly talk about the custody of the child under pre-1995 legislation as being with one parent for some part of the time and with the other for the rest of the time. This would appear to be a logical and sensible interpretation of the definition of custody set out in Section 63E (2).

Whether it be called custody or access, the time a child spends with the non-custodial parent is often bitterly controversial. The reasons relating to this controversy vary with the characters and behaviour of the parties involved, but a frequently recurring theme is the antipathy the custodial parent bears towards the non-custodial parent's new partner, and the desire (and frequently requirement) that the child not be brought into contact with 'that person'. Similarly, while the courts have been at pains over the years to point out that there is

no connection between matters of maintenance and custody, there is no doubt that in the minds of many parents the 'no pay, no play' mentality rules, just as in reverse the 'I have paid therefore I can play' mentality is evident in others.

Another matter that stands out as causing more problems than any other is a suspicion on the part of the custodial parent that the non-custodial parent has engaged, and will engage, in sexual conduct with the child during periods of access. The High Court was called upon to deal with this issue in the decisions of *B and B* (1988) FLC ¶91–978 and *M and M* (1988) FLC ¶91–979. The High Court unanimously upheld the decisions of the Full Court of the Family Court (which were majority decisions) and held that the ultimate and paramount issue to be decided in custody or access proceedings was whether the making of the order sought was in the interests of the child's welfare. The High Court introduced a test about sexual abuse: '... that a Court should not grant custody or access to a parent if that custody or access would expose the child to an *unacceptable risk* of sexual abuse' (p.77,081, emphasis added).

Just how this differs from the dissenting view expressed by Chief Justice Nicholson in the Full Court of the Family Court, that: 'There must be a real or substantial risk of abuse occurring as a matter of practical reality' (*M and M* (Full Court of the Family Court of Australia) (1988) FLC ¶91–958, p.76,927) is sometimes a little difficult to follow, however.

In practice, judges of the Family Court tend to err (as was foreshadowed by the High Court) on the side of safety, and to prevent access in circumstances where there is any plausible basis for believing that sexual abuse may occur. In other words, if a child is acknowledged to be safe with one parent and there is a dispute about its safety with the other, then the Court tends to suspend access, at least temporarily.

This difficult area was the subject of a Practice Direction from the Court (No.1 of 1991) which is designed to ensure that as soon as an allegation of sexual abuse is raised, special treatment is paid to the case to ensure that the proper issues relating to the welfare of the child can be resolved as quickly as possible.

A further area which from time to time has been the cause of great consternation is that of the non-custodial parent's sexual preferences. But the Court has steadfastly refused to prohibit all access merely because a non-custodial parent may be homosexual or living in a homosexual relationship.

Subsidiary matters relating to access

While objections by one parent to the other about how access might be carried out are almost as limitless as the variations to human personalities, a common complaint is that the children on access are either bored because the non-custodial parent does little or nothing with them or, at the other end of the spectrum, given far more in terms of material goods, outings, fast food and so forth than could possibly be afforded by, for example, a mother struggling to support them on insufficient income.

These sorts of complaints, together with the even more frequently voiced complaint that the children have told the custodial parent they do not want to go on access, are usually the catalyst for variation of access applications to the Court. It would be nice to think that there may be provision in the Court to deal with minor matters expeditiously and without excessive expense. Up until now this has not been possible and access variation has occurred only in the same way as any other application before the Court, with consequent expense and difficulty. This may mean that many parents suffer resentment about what is occurring during access without having any effective vehicle for disposing of the issue or resolving the conflict. This process reflects again the attitude inherent in the legislation that a 'once only' determination must be made that is expected (subject to unusual events) to last for the duration of parenthood.

Intractable access problems

For a small group of parents there is nothing a court or anyone else seems to be able to do to prevent almost endless fights about access. In every Registry in the Family Court in Australia, files can be identified which would fit into a category of 'intractable access problems'. These matters are identified by the number of occasions on which they are

back before the Court, frequently with no satisfactory resolution, or the number of times the parties will attend for counselling – again perhaps, with little resolution.

Perhaps such parties can be persuaded to use a different system of resolving their disputes. They may be persuaded to use arbitration, mediation or some other form of more appropriate dispute resolution. But ultimately, there are those who will fight in a court come what may, be it about property, custody, access or something else. If such people can be identified early at least they can be fast-tracked to a judicial solution (not as a reward for perversity but in recognition that no other solution will resolve the matter for them). As the report of the Australian Law Reform Commission (1995) on this matter, *For the Sake of the Kids*, identifies, there are no simple solutions to difficult access problems. Resolvers of conflict need an armoury of solutions and the dedication and the will to find the appropriate solution to each problem.

Separate representation for children?

The Family Court of Australia has the power (under Section 65 of the *Family Law Act*) to order that a child who is the subject of any proceeding before it be separately represented. This has been usually organised by Legal Aid Commissions which, while not obliged to do so, almost invariably fund such a representative.

The Family Law Council (Commonwealth of Australia 1989) made certain recommendations about separate representatives for children, which were adopted and adapted by the Family Court in *Re K* (1994) FLC ¶92–461. In particular, the Court set out extensive (but not exhaustive) criteria for matters requiring the child to be represented separately from its parents (see pp.80,773–80,776). The criteria are set out at the end of this section and reflect the concern that the child's voice be heard in disputes over his or her residence, care and nurture.

Prior to *Re K*, in the decision of *Bennett and Bennett* (1991) FLC ¶92–191, the Family Court had laid down certain guidelines relating to the operations and activities of a child's separate representative. In that case the Court had suggested that the role of the separate representative was analogous to that of counsel assisting a Royal Com-

mission; that is, to be impartial and to make submissions and suggestions to the Court about what the separate representative believes is in the best interests of the child (p.78,259).

The Full Court of the Family Court in *Re K* (p.80,776) also examined the provisions of the Convention on the Rights of the Child and the requirement therein that apparently all children should be represented. The Convention is not yet, as a whole, part of the domestic law of Australia, but the Court's reference to the Convention illustrates the concern for finding ways to let the voices of children be heard. The recent High Court decision of *Minister for Immigration and Ethnic Affairs v. Ah Hin Teoh* (April 1995) 128 ALR 353 held with specific reference to this Convention, that ratification by Australia of an international convention is a positive statement that the executive government and its agencies will act in accordance with it. The Commonwealth Government is considering a legislative response to the *Teoh* decision in the proposed *Administrative Decisions (Effect of International Instruments) Bill*.

The Chief Justice of the Family Court has indicated, in recent times, that he sees the possibility that the child's representative may not only be a lawyer but perhaps a small team of people from different disciplines; for example, a counsellor or a psychologist. This concept is part of the considerations of the Family Law Council in its 1995 report.

The concept of the child's right to be heard in the proceedings through his or her own representative is to some extent a development of the *Family Law Act*, and has become an increasingly urgent issue as this century draws to an end. The adversary system necessarily means that those representing the mother and the father may on occasions, for the benefit of their respective clients, not want to put before the Court some evidence which may be relevant to the welfare of the child. It seems logical that, at the very least, a separate representative should be in a position to ensure that all relevant information is put before the Court, irrespective of whether it is to the advantage of one parent or the other.

Originally, the separate representative was seen as an *amicus curiae* (friend of the court) whose function was principally to assist the Court in some general way, and not as someone with direct connections with the child. This concept has changed, and while it is

clear that the child's representative does not appear *merely* to express the wishes of the child or to follow the child's instructions, there is now a clear understanding that a child's representative should, at least to some extent, interact with the child – particularly a child of more mature years.

Re K and the new concepts of child representation have very serious implications for legal aid funding. In *Re K* the Full Court rejected the proposition that, as in New Zealand (and consistent with the Convention on the Rights of the Child), a separate representative should be appointed in all cases (p.80,773). It went on to say that: '... on reflection we think that it may be desirable for statutory guidelines to be provided and, in their absence, we think it appropriate we should endeavour to give some assistance and guidance to judges, judicial registrars and registrars as to when such an appointment should be made.'

The Court proposed that the guidelines '... are simply guidelines; they are not rigid rules of law and it does not necessarily follow that a departure from them will necessarily vitiate a judgment although judges, judicial registrars and registrars should, we think, give sufficient reasons for departing when they consider a departure is appropriate.' The Court continued: '... we consider that the broad general rule is that the court will make such appointment when it considers that the child's interests require independent representation.'

The guidelines set out in *Re K* can be summarised as follows. Appointments should normally be made in the following circumstances:

(1) cases which involve allegations of child abuse, whether physical, sexual or psychological;
(2) cases where there is an apparently intractable conflict between the parents;
(3) cases where the child is apparently alienated from one or both parents;
(4) cases where there are real issues of cultural or religious difference affecting the child;
(5) where the sexual preferences of either or both of the parents or some other person having significant contact with the child are likely to impinge upon the child's welfare;

(6) where the conduct of either or both of the parents or some other person having significant contact with the child is alleged to be anti-social to the extent that it seriously impinges on the child's welfare;
(7) where there are issues of significant medical, psychiatric or psychological illness or personality disorder in relation to either party or a child or other persons having significant contact with the children;
(8) any case in which, on the material filed by parents, neither seems a suitable custodian;
(9) any case in which a child of mature years is expressing strong views and the giving of effect to which would involve changing a long-standing custodial arrangement or a complete denial of access to one parent;
(10) where one of the parties proposes that the child be permanently removed from the jurisdiction or permanently removed to such a place within the jurisdiction as to greatly restrict, or for all practical purposes exclude, the other party from the possibility of access to the child;
(11) cases where it is proposed to separate siblings;
(12) custody cases where none of the parties is legally represented;
(13) applications in the Court's welfare jurisdiction relating in particular to the medical treatment of children where the child's interests are not adequately represented by one of the parties.

Should we keep the children out of it?

The full implications of *Re K* will take some time to be known, but the practical effect of the decision is that in every custody case, at least at the directions hearing stage, consideration will be given by the Court as to whether a separate representative should be appointed.

Parties, counsellors, lawyers and judges are tentatively considering how children should be involved in these proceedings. In most cases, only the very smallest of children would not know that there were disputes about them before the Court. The most frequently expressed

view of children to counsellors and others is that they would prefer both their parents to be together and with them. Equally, children, as the unfortunate meat in the parental sandwich, are in some cases obliged to say things to each parent which children believe parents want to hear. This leads to conflict where both parents purport to carry out what they see as the wishes of the children.

It is widely thought that it is not appropriate for children to be sitting in a court room hearing the allegations and counter-allegations made by their parents in custody cases. While it may be true that such allegations ought not be made in custody proceedings, it is difficult to imagine how – given human nature and the emotional circumstances surrounding a custody case – bitterness, anger and resentment will not produce allegations. Perhaps a situation where a trusted person exists in whom the child can confide and who, in turn, has access to appropriate legal assistance and counsel, can at least provide a starting point.

Whatever may be said about what is not the right way to involve children, there can be little doubt that there is growing recognition that it is important for children to be involved. While they should not feel or be made to feel that it is their responsibility to resolve the conflict, children should be made aware that they are the focus of such conflict and have an important role to play in determining the outcome. It is their best interests which are at stake.

The welfare jurisdiction of the Family Court of Australia

It will have been noted that one of the circumstances in which the appointment of a child's representative is considered appropriate, is where the Court is exercising what has become known as its 'welfare jurisdiction'. The present Section 64 (1) gives the Court power to deal with 'custody, guardianship *or welfare of*, or access to a child' (emphasis added). There seems little doubt that the inclusion of the words 'or welfare of' give the Court a much wider jurisdiction than matters relating directly to custody or guardianship.

Originally it was thought that the Court's power in relation to children derived from the marriage power accorded by Section 51

(xxi) of the Constitution, with further support derived from the divorce power it accorded (Section 51 (xxii)). The precise ambit of the welfare jurisdiction of the Court is examined in an excellent article by John Seymour (1992). The article outlines in precise detail the nuances and judicial and legislative glosses which have contributed towards the development of this jurisdiction of the Family Court of Australia. While it is a fascinating exercise, it is not the purpose of this chapter to engage in any significant dispute with Dr Seymour, or (seriously) to question the breadth of this jurisdiction of the Court. It is enough to say that as a result of judicial interpretation, the reference of powers by the States and Territories to the Commonwealth in relation in ex-nuptial children and the cross-vesting jurisdiction of the Family Court (which has brought into play the jurisdiction of the State and Territory Supreme Courts exercising their *parens patriae* jurisdiction), the Family Court has the beginnings of a substantial development of its jurisdiction.

There are serious doubts (Seymour 1992) about how far the welfare jurisdiction of the Court extends to ex-nuptial children. It is notable that the references of power of the Australian States and Territories have expressly excluded the word 'welfare'. There is also no doubt that they have jealously guarded their own child welfare legislation procedures. This protection reaches its high point in the provisions of Section 60H that: '... a court having jurisdiction under this Act must not make an order under this Act ... in relation to a child who is under the guardianship, or in the custody or care and control of a person under child welfare law ...'

The States and Territories do not want the Family Court to exercise the usual child welfare provisions (such as care applications) in place of the State and Territory Magistrates Courts and Children's Courts which presently deal with these matters. Equally it is clear that the Family Court does not at present seek such a jurisdiction.

On the other hand, those judges of the Family Court who have studied the English court system see advantages in having an integrated system which deals with all matters relating to children. This is, however, a position which is still far from being a reality in our federation of Australian States and Territories.

Medical procedures for children

In more recent times the most obvious examples of the Court's wider jurisdiction in relation to the welfare of children have been in relation to medical procedures and, in particular, to questions of sterilisation.

The High Court decisions of *Secretary, Department of Health and Community Services v. JWB and SMB* (1992) FLC ¶92–293 (*Marion's* case) and *P* v. *P* (1994) FLC ¶92–462 have examined the question of sterilisation and have indicated that consent to the sterilisation of a child, whether intellectually disabled or not, is a matter beyond parental power, and hence is not an exercise of the Court substituting its judgment for that of a parent. Rather, it is the Court exercising its *parens patriae* jurisdiction in a broader concern for the child's welfare.

It is obvious that there are significant jurisdictional problems about ex-nuptial children because of the failure to refer 'welfare' jurisdiction from the States and Territories. However, it does seem that such jurisdiction might be exercised by the State and Territory Supreme Courts, and hence under the cross-vesting legislation by the Family Court. If this is not so the Court may be driven to a further consideration of what is 'a child of the marriage' and the nature of the marriage power under the Constitution. There may also have to be a careful reconsideration of whether the giving of consent to medical procedures is in fact a facet of guardianship or custody or parental responsibility. Two States (New South Wales and South Australia) at present have Guardianship Boards which, among other things, determine issues about medical consents. *P* v. *P* is a particularly important case for them because it holds that to some extent the Family Court can override the Board.

Clearly, however, there is a need for legislative intervention. That legislative intervention, if by the Commonwealth, will itself provoke further litigation unless the States and Territories are prepared to concede that in some areas it is appropriate for the Commonwealth to exercise jurisdiction, perhaps through the Family Court of Australia. Indeed, the Family Law Council has considered this issue, and it seems appropriate that there should be federal jurisdiction to deal with these matters; but by whom such jurisdiction should be exercisable is an interesting political question. The case for national uniformity is

compelling, and suggests that the jurisdiction should be exercisable by the Family Court provided it can adjust its procedures to allow quick and cheap access to appropriately trained judges.

The Family Court of Australia, through the Chief Justice, has given unequivocal commitments to the revision of its procedures to ensure that there is easy access and expertise that will permit that Court to provide the role traditionally exercised by Courts of Chancery. Whatever forum is to hear and determine these matters, what is abundantly clear is that this is yet another instance where what is crucially needed is child and family support. This is not a question only of Court advocacy but also of advocacy to government departments; for the provision of sympathetic and informed advice about respite and social care, nursing education and counselling assistance. This is a brief for a change in process, not merely a single amendment. With such assistance parents can make informed decisions and judges can have proper and appropriate evidence to help them to reach the best available solution. Regrettably, this means money – government money. (An excellent model of the role of those who are to assist the child and family in these difficult cases exists in the Office of the Public Advocate in Victoria (Britain & Brady 1994)).

Communicating family law

One of the pervading and difficult problems in family law has been that its practice involves the interaction of two separate disciplines: law and social science. Lawyers, by their training, are concerned to analyse, identify and examine issues by putting them forward in a contrasted way and facilitating a decision based on those issues to determine a matter. This does not mean, of course, that lawyers do not employ many other skills both in their day-to-day practice and in their presentation of matters before the Court. What it does mean, however, is that lawyers tend to be *result oriented* and to see the judgment relating to various issues as being more important than other matters about the relationship of the parties involved. For a lawyer, the problem exists today to be solved today, so that it will not be a problem in the future.

Social scientists, on the other hand, tend to see human problems in relationships as continuing and evolving. Factors which may be helpful

or even determinative today may not be helpful, or of any determining value, tomorrow. Human relationships are constantly changing as different facets of the emotions and logic of those involved drop into the cauldron of the relationship. To some extent, for social scientists there is no cure or solution; merely an understanding that people are hurting now and that treating what is happening at any particular time is enough.

These two pictures are obviously over-generalisations, but they nevertheless demonstrate some of the problems which occur in family law when the two professions meet from different directions in the destruction or perhaps the resurrection of a relationship. Each approach has some validity, but their interaction poses difficulties – not because one approach should necessarily prevail over the other, but simply because at any time there is no absolute right decision or method. Human emotions are so complex that logic is often eroded and emotions frequently determine what a person's decision will be.

A particular area in which there is often significant difficulty for counsellors, carers and lawyers in understanding each other and in appreciating the other person's point of view, is that relating to child abuse. Counsellors who receive reports about child abuse do not always follow the strict processes dictated by court procedures for the obtaining of information and the recording of the facts. Subsequently, in court proceedings which are designed to look at individual and competing rights, lawyers are critical of the counsellor, and the counsellor critical of lawyers. The average parent or child has every right to be frustrated and annoyed that those who are purportedly trying to help them cannot even reconcile their own differences about how this help should be administered.

In the past, the assumption has been that the best way of making any decision on matters relating to children was to refer them to a judge. Once the facts were clear, a judge could make a decision and that was the end of the matter. However, it is now clearly apparent that judicial determination is not the end of the matter, and that the parties do not generally have problems that are capable of being resolved by one person at any one time. Accordingly, it becomes very important that each of those who might help in finding a solution in

often stressful circumstances knows how the others involved might operate and why.

Lawyers and social scientists at present interact in relation to children on an almost daily basis, yet do so with an almost total disregard for the other's system, values and disciplines. In my view, it is imperative that they – and be that solicitors, barristers, judges, counsellors, mediators, conciliators, registrars or any other person involved in the process of family law – spend time talking and, perhaps more importantly, listening to each other with an open mind so that there can be some hope of a team solution to a difficult problem. This process of education has already been begun by the Family Court and is worthy of significant encouragement.

It is suggested that into every law course there must be injected study which enables the lawyer to understand different disciplinary approaches. For years law schools have prided themselves on the fact that above all else they teach the proper legal method of approaching problems. This is all very well for dealing with High Court cases but may not be effective in dealing with day-to-day situations with children and parents. Equally, those who wish to practise as clinical psychologists or counsellors should be obliged to have as part of their training some understanding and knowledge of court processes and the interaction and determination of legal rights.

The professions need to appraise critically procedures and practices to see whether they accomplish what they set out to do, and whether children's or parents' rights are being violated in the process. Additionally, it is important that there should be continuing interchange on a practical level – perhaps informally – where parties can discuss in a non-threatening environment their different points of view, how these might be resolved, and how they might work together for the benefit of the children and their parents. While this must, by necessity, be a responsibility of the professional bodies of the respective disciplines, it must also be a function of all those involved with children's matters to remind these professional bodies of their obligation to create environments in which communication is possible. How this process of integration and communication can occur is the future and the challenge for those associated with children and the family law.

Where to now?

Ultimately, the objective of family law is to deal sensitively with the rights and responsibilities of family members in a way that takes account of the dignity and the inherent capacity of human beings to live with and react to each other in a loving and caring way, even in different and changed circumstances. The difficult proposition that the Court is obliged to make a 'once only' intervention in the long period of a child's life during which relationships shift, change, develop and recede, will continue to be a problem.

Human nature cannot be changed and the prescriptions of the legislators and those who advise them as to how parental responsibility might be shared and trauma for children minimised can, at best, represent guidance and a framework for the development of different parental attitudes. The proposed amendments to the *Family Law Act* will not, and are not expected to, affect those cases (said to be only 5 per cent) in which there are substantial disputes that can only be resolved by the Court. The amendments may, however, bring about a situation where parents do genuinely consider their options and try to acknowledge that their separation or divorce does not stop them from being parents in a continuing and real sense.

The amendments to the *Family Law Act* at least provide an opportunity for a change in the way in which children are involved in court proceedings about custody through recognition and acceptance of the concept of children's rights. That change may not develop as those who advocate it hope it will. What is clear, however, is that if the present regimen continues, the alienation of children from their parents through court proceedings will continue, and the attitudinal change referred to above will not be achieved except over a longer period and with a much more difficult transitionary phase.

It is startling perhaps to look at the change in emphasis from the 1970s to the 1990s. In the space of one generation there has been a significant shift in emphasis from rights of parents in custody matters to rights of children. The new legislation will not bring to an end all conflict over children. At best it can provide a basis upon which people with goodwill can agree. What the shift has done, however, is

to provide a basis for a reorientation of thinking so that all those associated with children, be they parents, judges, counsellors, lawyers, psychologists and even the children themselves, can see that the main efforts of the law where children are concerned in the breakdown of a relationship should be those children's best interests. Perhaps in this way some of the hardship that children must inevitably suffer in these circumstances will be reduced.

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5
Children's Rights in School Education

Robert Ludbrook

Education is something we have all experienced. Whether we remember our days in the old school yard as the happiest days of our lives or whether we were glad to escape from school into the adult world, nearly all Australians either as students or as parents of students have at some time had personal experience of the school education system.

Education is not easily fitted into a 'service provider' and 'service consumer' analysis. Who are the service providers: departments of education, school councils, school principals, teachers? The New South Wales *Education Reform* Act 1990 states that 'education is the primary responsibility of the child's parents', and one might even argue that parents are the primary service providers. Some States and Territories have devolved some responsibility to school councils with representatives from various sectors of the educational community.

Deciding who are the consumers of education is equally difficult. Students, whether willingly or unwillingly, spend most of their weekdays sitting in the classroom and could be said to be the primary consumers. Parents of school children in Australia have a real interest in the availability and quality of educational services and the legal responsibility for ensuring that children go to school. Parents make most of the choices about their child's education and, in the private system, have an added financial interest in the quality of the educational services they are paying for. The relationship between students, parents and educators can be complex and confusing, and the boundaries are often unclear. This lack of certainty frequently works to the disadvantage of students.

Consumer rights in education

Education is seldom seen as a social service and the notion of schools providing a service for students and their parents is not often expressed. Schools are often viewed as self-enclosed communities, part of a separate sphere governed by their own ideology, rules and priorities, and for which there are historical and pedagogical reasons. The school world is often resistant to interference from other disciplines such as the social services and the law. The notion of schools somehow being above the law has never received acceptance from the courts, but courts have traditionally shown a reluctance to intervene in internal school matters. The courts have generally accepted that school principals and teachers are the best suited to make such decisions.

The concept of 'consumer power' in education is not well developed in Australia's state education system, and an analysis of education in terms of the rights of children and their parents is strongly resisted by many educationists. The approach is often that schools have been entrusted with the difficult task of imparting knowledge and skills to children; that teachers are professionals with a specialist expertise and they should be free to get on with the task without outside interference.

This approach is enhanced by the traditional lack of community control and community accountability in Australian state schools. While there has been some move in the last decade to devolve the power of education departments and increase the input of parents, students and the community, the steps forward have been tentative and faltering. A comparison with educational developments in England and New Zealand shows how timid Australia's approach has been. There is an understandable fear that devolution is likely to be an excuse for reduction in resources, closure of schools, redundancies and worse employment conditions for teachers.

A right to education

In Australia, government school education is the responsibility of State and Territory governments and education is paid for out of their state budgets. The Commonwealth has traditionally provided some targeted funding for both state and private education.

The United Nations Convention on the Rights of the Child (the Convention), ratified by the Australian government in 1990, requires Australia to recognise the right to education of everyone under the age of 18 years. In recognising this right, Australia is committed under the Convention to making primary education 'compulsory and available free to all' (Article 28 (1) (a)). With secondary education, the Federal Government is required only to 'encourage the development of different forms of secondary education including general and vocational education, and to make them available and accessible to every child' (Article 28 (1) (b)). The Convention does not demand compulsory secondary education, although it does urge the introduction of a range of options for secondary education with financial assistance in the case of need.

It is one of the basic tenets of Australia's education system that school education should be compulsory and free. In all States and Territories there is a requirement that parents enrol their children at a state or approved private school and that they ensure their attendance between the ages of six and 15 years (16 years in Tasmania). State and Territory education laws include a statement that 'instruction' is free for all students at state schools. There is room for debate about whether 'instruction' is limited to the provision of teaching or whether it is wide enough to include basic teaching materials and other resources and facilities reasonably necessary for the child's instruction. The United Nations Convention and usual principles of interpretation suggest that a broad meaning should be given to the term 'instruction'. A later section deals with the rights of state schools to claim fees.

Australia's education laws

Education law is contained in education acts and regulations and in policy documents issued by State and Territory education departments. Education acts vary considerably in their vintage: *Education Act* 1928 (WA); *Education Act* 1937 (ACT); *Education Act* 1958 (Vic); *Education Act* 1964 (Qld); *Education Act* 1972 (SA); *Education Act* 1979 (NT); *Education Reform Act* 1990 (NSW); *Education Act* 1994 (Tas).

Australia's education laws were adapted from Anglo-Celtic models and, in most States and Territories, set out a series of machinery

matters to do with teachers, their conduct and their powers. In New South Wales, the Minister of Education is given the power to control and regulate student discipline in government schools and has prepared guidelines for schools to adopt as part of their discipline codes (Section 35 *Education Reform Act* 1990). In Victoria, school discipline policies are a matter for school councils and school principals are responsible for the nature and extent of punishment imposed (Regulations 5.4 and 5.3 (b) *Education Regulations* 1988). In Queensland, the principal of a state school is responsible for the progress and good behaviour of students (Regulation 32 *Education Regulations* 1988). It is teachers who, in Western Australia, have the authority to secure the good behaviour of students (Regulation 28 (2) *Education Regulations* 1960). Where there are no express statutory or regulatory powers the school can rely upon the common law power to make reasonable rules for the good order and discipline of its students.

Seldom are students or parents granted explicit rights under education acts or regulations. Only the *Education Reform Act* 1990 of New South Wales states the purpose of education and gives an unequivocal right to every child to receive an education. Having given children a right to education, the New South Wales Act places primary responsibility on parents for providing that education, but then states that it is the 'duty of the state to ensure that every child receives an education of the highest quality'. What is hinted at, but not expressed, is that education is a partnership between parents and the State Government. But Section 6 (1) (m) makes it clear that the State Government is the senior partner. Educators must have regard to the 'provision of opportunities for parents to participate in the education of their children'.

No States or Territories give children an express right to free education. All place an obligation on parents to send their children to school, and announce that instruction in state schools is to be free. However, there is uncertainty whether it is only compulsory age students who qualify for free instruction. Tasmania's new *Education Act* 1994, launched under the banner 'Taking Tasmanian Education into the 21st Century', restricts free tuition to children 16 years and under, and permits a charge to be made to cover incidental costs and expenses

in providing educational instruction. In the Northern Territory, the Minister is required to 'assist parents ... in fulfilling their responsibility to educate their children according to their individual needs and abilities'. Some Australian education acts show their age. Until last year, children in state schools in Victoria had to be given instruction in 'temperance' and be taught 'drill' and 'sewing and needlework'.

Educational quality

There are many theories about education: what it is, what it should be and how the quality of education should be measured. Judith Chapman, speaking in 1994 at an International Congress on School Effectiveness (AEU 1994) suggested there was widespread agreement as to the values and characteristics of a good school:

- schools must be democratic, equitable and just;
- schools should develop in students a sense of independence, a feeling of their own worth as human beings and confidence in their ability to contribute in social, political and moral ways to the health and stability of society and its members;
- schools should give students access to knowledge, skills and attitudes needed in today's complex society;
- schools should prepare our citizens to conduct their interpersonal relationships with one another in ways that contribute to the health and stability of society and the individuals who comprise it;
- schools should engender a concern for the cultural as well as the economic enrichment of the community.

No attempt is made in Australian education law to define what is meant by education, nor is there any commitment as to the quality of education provided.

The one exception is in New South Wales law where the *Education Reform Act* 1990 acknowledges a duty of the state to ensure that every child receives education of the highest quality, and requires educationists to 'promote a high standard of education in government schools'. In New South Wales regular quality assurance reviews are carried out by a Quality Services Directorate.

In the United States, schools and education boards have been sued by parents and students who claimed that the schools had failed to provide education of a reasonable quality. In New South Wales, it might be open to a parent or student to bring a claim for damages for breach of a statutory duty if the quality of education provided fell significantly below that standard. In contrast, Victoria has recently passed amendments to its Education Act (*Education Amendment Act* 1994) which deny students and parents rights of access to the courts to challenge the closure of a state school.

Education from the child's point of view

Compulsory education means a loss of autonomy and personal freedom for the child and extends the child's dependency on adults beyond the time when such dependency is essential for the child's survival and development. Children of compulsory school age face significant restriction of their freedom of movement and assembly, their freedom of expression and their freedom of thought, conscience and religion. They are denied the right to work during school hours and thus to earn money. In Australia, as in most industrialised societies, this loss of freedom is seen as a necessary sacrifice for children's greater good and for that of society, which has an interest in its citizens attaining a high level of education.

Private or independent schools

All Australian States and Territories allow for private education in church schools or independent schools. Parents are usually required to pay fees, although there is likely to be some subsidy from State and Territory governments and from the Federal Government. In the private system there is a written or implied contract between the parents and the school which defines the terms of the services provided by the school. Children are not parties to this contract and as their situation is not covered by education laws and regulations they must look to the general law for any rights. Article 28 (2) of the United Nations Convention requires that the Australian government must ensure that school discipline be administered in a manner consistent with the child's human dignity, and in conformity with the Convention. There is a

strong case for arguing that this requirement is applicable to private as well as government schools. Anti-discrimination laws (including laws relating to sexual harassment) in most States and Territories apply to students in private schools. If students are facing expulsion from school the principles of natural justice apply and the procedures must be fair.

School fees

State schools have no legal power to charge 'fees'. They can ask parents for a voluntary donation towards the cost of running the school or for a payment to meet the cost of additional services or materials provided for students. Yet many state schools persist in claiming 'school fees' and putting pressure on parents and students to pay the amount claimed. The National Children's and Youth Law Centre has received many reports of instances where students have been humiliated for their parents' failure to pay contributions to the school, where students have had their names written on the blackboard, and where students have been denied educational materials, end of year reports and even school prizes. In one case a teacher allegedly demanded that a student pay her lunch money to the school.

Choice of school

The responsibility of enrolling a child at school and ensuring that the child attends regularly lies with the parents or carers of the child. In every State and Territory it is a criminal offence for parents, guardians or other carers to fail to enrol the child in a state school or approved non-government school unless the necessary consents have been obtained for the parents to educate the child themselves. Failure to ensure attendance can result in a fine. Some States and Territories provide that students can be excused from attendance at the discretion of the principal if a parent or carer (but not the student) provides a satisfactory reason. Children clearly do not have the right not to go to school if they are of compulsory school age. But do they have a right to choose which school they attend? Students of compulsory school age cannot enrol themselves in a school and the choice of schools is deemed to be a parental decision. In all States and Territories there is a system of zoning for government schools so that children have a right

to enrol at a designated school close to where they live. Some States and Territories have introduced more flexible rules which allow children to be enrolled in schools outside their designated zone.

Children's rights in education

In 1995, a senior officer of an education department commented in a personal communication with the author that: 'Education is no longer a right – it is a privilege.' Increasingly, education is being regarded as a privilege which can be withdrawn if the student does not behave appropriately. But in the last decade, changes in the common law and international law have highlighted children's rights in education. The *Gillick* case, a decision of the English House of Lords in 1985 (*Gillick v. West Norfolk AHA* [1986] AC 112), rejected the idea that children remain under the control and authority of their parents (or other adult carers) until they reach the age of majority (18 years in Australia). The judges determined that children were able to decide matters for themselves when they attained the intelligence and understanding necessary to weigh up the various possibilities and make an informed decision. Thus, while certain powers are given to parents and other adults to enable them to protect and promote a child's welfare and interests, parental powers are held in trust for the child and dwindle as the child grows and develops a greater capacity to take control of his or her own life.

Although the *Gillick* case did not deal with students' rights in education, the principles are applicable to school situations. Teachers can no longer rely on their powers as teachers as giving them unqualified control and authority over students. Any exercise of power must be able to be justified in terms of the students' incapacity to make decisions for themselves and must be shown to be necessary to advance their welfare.

Article 12 of the Convention on the Rights of the Child contains the important requirement that children be given the right to express their views freely in all matters which affect them; that their views be given due consideration, taking into account their age and maturity; and that they may have a representative to help them put their views forward. The Convention in several places emphasises that authority

and control of parents over their child must give way to the child's evolving capacity (see Articles 5 and 14).

Children can no longer be treated as passive objects about whom parents and teachers can make decisions. They are independent people with increasing powers of self-determination as they grow in maturity and understanding. With very young children the protectionist role of adults predominates, but as children move towards adulthood they are empowered to make more and more important decisions for themselves. Adults can advise and suggest, but children move to a situation where they are increasingly able to make their own choices and determine their own actions.

Is there a role for individual student rights?

Some would argue that in schools the individual rights of students must be subsumed in the collective rights of the school. Some teachers would identify their role as being the socialisation of young people so that they can be prepared for a full and useful life in Australian society. Schools are places of learning and learning, it could be argued, is best fostered in an orderly and disciplined school environment where students do as they are told so that those who are anxious to participate and learn are able to do so with the minimum distraction and disruption.

Students who insist on their individual rights, including the right to be different and to challenge the authority of the school, may be seen to be infringing the rights of those students who are happy to conform. There is also a resources argument that students who seek to be different attract a disproportionate amount of the time of teaching staff and school resources with the result that other 'obedient' students are disadvantaged.

There are some signs from the burgeoning of interest in human rights and the growing influence of the United Nations in promoting fundamental human rights, that the former protection from scrutiny enjoyed by schools may be in danger of erosion. In February 1995 the United Nations Committee on the Rights of the Child, in its observations on the report filed by the United Kingdom, made critical comments about perceived breaches by the United Kingdom in ensuring

that government and independent school students were being accorded the rights assured to them in the United Nations Convention. Australia is likely to face similar criticisms when the Committee comes to file Australia's first report.

A rights culture in schools

There is a discernible resistance amongst educators to the idea of children having independent rights in education. Historically, school education has placed considerable emphasis on the teacher's authority and control. It is believed that effective education is most likely in a disciplined and firmly controlled environment and there remains considerable emphasis on conformity, respect and obedience. Educational philosophies which encourage informality, experimentation, self-motivation and innovation have had some influence on educational approaches, but most Australian state and independent schools remain firmly rooted in the English pedagogical tradition.

A 'Know Your Rights at School Kit' distributed in 1994 by the National Children's and Youth Law Centre, which set out in plain language the rights of students in school, was greeted in some circles with howls of anger and derision. Typical comments were: 'The Kit should only be circulated under strict parental supervision'; 'The tone of the Kit is confrontationist'; 'The Kit could lead to United States-style schools where weapons and drugs are common and the enforcing of school rules may turn into a lawyer's picnic'; 'Teachers could be forgiven for finally throwing in the towel if this outrageous publication is not immediately filed in the waste paper basket'.

While in the wider community the notion of children having independent rights is gaining greater acceptance, there seems to be a fear within the education system that allowing students independent rights (or telling them what those rights are) will lead to anarchy or insurrection. It is as if the lid needs to be kept tightly on schools lest students turn into uncontrollable barbarians.

The idea of children as untamed savages has its roots at least as far back as the Old Testament and re-emerged in the writings of Martin Luther and in William Golding's (1954) novel *Lord of the Flies*. Schools want students to be self-managing and responsible but

sometimes severely restrict the opportunities for them to be involved in decision-making processes and to take responsibility for their own actions.

Attendance and truancy

Children do not commit a criminal offence by not attending school, but in the Australian Capital Territory the Court hearing the charge against the parents, if satisfied that the child is a truant, can place the child on probation or order the child's detention in an institution (Section 18 *Education* Act 1937 (ACT)). Similarly, care and protection laws in South Australia have non-attendance at school as a ground on which a finding may be made that a child is in need of care and protection. Thus, for children in South Australia or the Australian Capital Territory, truancy may be a route into the care system.

In the Northern Territory and Tasmania, the state Department of Community Services might intervene on the grounds that a child refusing school was not under effective control. Likewise, in New South Wales children of compulsory school age who are not at school can, if seen in a public place, be required to give their name and details to the police or an attendance officer and there are sometimes additional powers to take the child home or to school (see Section 122 *Education Reform* Act 1990 (NSW)).

Home schooling

Every Australian State and Territory allows for the possibility that children may be educated at home by their parents. In some States and Territories there are defined statutory procedures; in others there is a general discretionary power to exempt students from attendance. Parents who take up the home schooling option may be critical of aspects of education provided through the state system or may have a religious or conscientious objection to formal schooling or the official school curriculum. This can be seen as a parental right to choose alternative schooling rather than the child's right of choice. Even if a child could find a competent adult who was willing to educate them outside of the school system they would not be able to get the necessary exemption unless a parent supported their application.

The New South Wales provisions are typical of this situation. Parents may apply in writing to the Minister of Education in that State for registration of their child for home schooling, which can be granted for up to two years. The ability of the parents to provide instruction in accordance with education regulations and curriculum requirements is investigated by the Department. If registration is refused, rights of appeal exist (Part 7, Div. 6, *Education Reform Act* 1990).

Legal bases of schools' powers

Traditionally, the power of schools and teachers over students was said to derive from the common law principle of *in loco parentis*. Parents were seen as handing over their children to the school for the purpose of educating them, and it was assumed that the parents delegated to the school and its teachers their parental powers. This principle (which was part of English law but never part of Scottish law and has not been followed in the United States) has sensibly been abandoned in Australia's education law, certainly in relation to compulsory state schooling (*Ramsay v. Larsen* (1964) 111 CLR 16). In state education, one looks to education acts and regulations for the source of the proposition that teachers can impose and enforce rules for the good order of the school and the discipline of students. As an American judge once commented, a teacher without the power to discipline students is like a schoolroom without doors and windows.

Student involvement in school decision-making

Students can no longer be treated as passive receptors of education. The old-fashioned method where a teacher instructs and the students sit quietly and listen, is perhaps not the most effective method of training students to become knowledgeable and skilled adults. Student participation helps students to learn to be active participants in their society through experience in making or influencing decisions in the class, the school and the education system. Through their own special skills and insights, they can bring a consumer perspective to the classroom.

Student participation in school decision-making is not just good educational practice. It is a fundamental legal right recognised in Article 12 of the United Nations Convention on the Rights of the

Child: the right to express their views freely in all matters that affect them and the right to have those views taken into account when decisions are made. Unfortunately, the 'adults know best' approach seems to have become institutionalised in Australian schools and there has been disappointing progress in empowering students to play a significant role in school issues.

Most Australian States and Territories have, since the 1980s, moved some way towards greater student involvement in school decision-making, but progress has been disappointing. One commentator has argued (Holdsworth 1993) that the emphasis from the late 1980s on economic rationalism, cost-effectiveness and management strategies has led to a falling off in support for student participation. There is inevitably an ebb and flow in the enthusiasm of students having input into school policies: key students leave school; there are competing pressures of completing assignments and passing exams; support from the school and its staff may wax and wane; and students may lose interest if their recommendations and suggestions are ignored. The National Children's and Youth Law Centre receives regular complaints from students that Student Councils or Student Representative Committees have no real power and do little more than fundraise for the school, arrange social activities and make recommendations on fringe issues.

Responsibility for supervision and care of students

In Western Australia, education regulations (*Education Act Regulations* 1960 (WA)) require the principal of a school to 'make proper provision for the supervision of the children attending the school when they are at play during lunchtime and other school breaks' (Regulation 30), and teachers must be present at least 15 minutes before school commences to prepare materials for work and to secure good behaviour among the students (Regulation 31). Generally, in other States and Territories the responsibilities of the school for the care, supervision and safety of its students are left to be regulated by the common law.

The liability of schools and education authorities for injuries suffered by students was explained by the High Court of Australia in

Geyer v. Downs (1977) 138 CLR 91 as follows: 'Children stand in need of care and supervision and this their parents cannot effectively provide when their children are attending school; instead it is those then in charge of them, their teachers, who must provide it.'

The standard expected of teachers is the degree of care and supervision that a reasonably prudent parent would exercise over his or her own child. Schools have a duty to take positive steps to ensure the safety of students and, as evident in the following, the courts have required a high degree of care and supervision.

Education authorities have been held liable for: injuries caused to a 15-year-old who was seriously injured when swinging on the school flag pole in the playground before school (*Introvigne* (1980) 48 FLR 161); a student rendered quadriplegic as a result of a neck injury suffered in a scrum at an inter-school football match (*Watson v. Haines* 1986); a 16-year-old injured during a school canoeing excursion while moving a trailer (*Munro v. Anglican Church* 1987); a student injured after being hit by a softball bat wielded by another student on school grounds before the commencement of the school day (*Geyer v. Downs* 1977); a 12-year-old injured in erecting a catwalk for a fashion parade to be held at the school (*Haines v. Rytemeister* 1986); a young child who suffered burns after straying from the classroom to a barbecue area (*Mill v. South Australia* 1980); a student hit by a missile thrown by another student (*Evans v. Minister for Education* 1984); students injured in an explosion resulting from their mixing of chemicals (*Bartley v. Haines* 1989); a student injured during physical education after tripping while jumping over a fixed bench (*Smith v. A.G. Tasmania* 1991); a student struck by a shot thrown by a fellow student on the athletic field (*Thomas v. South Australia*); a 5-year-old injured after being released early from class (*Barnes v. Hampshire (UK)* 1969); a 13-year-old who fell off the back step of a school bus (*Shrimpton v. Hertfordshire (UK)* 1911).

Schools and education authorities have been held not liable where the injury was caused by a breach of school rules and/or the school had taken reasonable steps to supervise the students. For example, a student who was injured after tripping over a school bag while running in a school corridor failed in a claim for damages, it being shown that the rules against running in school corridors and leaving bags in the

corridor were well known and were enforced (*Gaetani v. Christian Brothers* [1988] Australian Torts Reports 67, 389). Similarly, schools were held not liable for: a student injured as a result of faulty equipment on an 'Outward Bound' course, where the Court found the school was entitled to rely on the care and competence of the instructor (*Brown v. Nelson* 1971); a student who fell while using the vault in the school gymnasium (*Wright v. Cheshire* 1952); a student injured after being pushed off a chair by another student (*Barker v. South Australia* (1978) 19 SASR 83); a student who, in disobedience to instructions, returned to a trampoline and was injured (*Hills v. South Australia* 1985); and a student injured while taking part in a game as part of physical education when the activities were adequately supervised (*Kretshmar v. Queensland* [1989] Australian Torts Reports 68, 888).

In Australia, education departments either insure against claims for personal injuries or they meet such claims out of their own funds. In other countries no-fault accident compensation schemes or insurance schemes have been developed which rely on contributions from both the school and parents.

Responsibility to report neglect or abuse of students

Mandatory reporting is an obligation imposed by law on designated professionals to report to state authorities a suspicion or belief that a child is or has been at risk of abuse. Failure to report can attract criminal sanctions. Children spend more time with teachers than other professionals, and school staff subsequently have greater opportunities to see signs of abuse or neglect or hear from students of abusive situations. Reporting obligations vary according to the State or Territory in which the school is situated. In all States and Territories, other than Tasmania, Queensland and Western Australia, teachers and school counsellors have a legal obligation to report suspected abuse of students. In Tasmania, a person who reports abuse is given statutory protection from defamation or disciplinary proceedings.

There is a tension between a child's need for protection and the child's right to confidentiality and self-determination should they turn to a professional for help. In the words of Justice Fogarty of the Family Court of Australia:

> 'Adolescents who consult with professionals need to have their own feelings and confidences respected. Although the obligation to report remains, the process by which that occurs and the manner in which it is handled needs to take account of these concerns, especially teenage girls reporting incidents of, for example, sexual abuse. Unless handled sensitively there is a risk that the adolescent will be reluctant to make a disclosure where it is clearly in the interests of that person that he or she does so.' (Sandor & Bondy 1995, pp.18–19)

Where there is no mandatory reporting requirement, it is important that issues of confidentiality and voluntary reporting be covered by teachers and school counsellors in their professional code of ethics. Students should be made aware of any mandatory requirements or professional codes as to confidentiality and reporting.

Confidentiality and school counsellors

Children often talk to teachers and school counsellors about what is happening in the family home, and this information is capable of being used by the school in a way which may breach the privacy of the family. The responsibilities of teachers and counsellors in respect to students and their parents is a difficult and complex area which embraces such issues as: Can a teacher assist a student to obtain contraception or an abortion without informing the parents? Can and should a school counsellor breach a child's confidentiality where he or she believes this will promote the child's welfare or protect the child (or other children) from abuse? Can a school principal require that a teacher or counsellor divulge information volunteered by a student about drug involvement?

It is difficult to answer these questions because there are uncertainties as to whether the prime responsibility of teachers is to the students they teach, the parents who are obliged to send their children to school, to the school principal as the person in charge of the school, or to the Department of Education which pays their wages. Teachers have a bewildering range of responsibilities to other members of the school community and it is unrealistic to look to the law to find answers to these complex questions. The teaching and counselling

professions need to develop a clear code of ethics and statements of policy so that students who seek counselling or advice can be assured that their confidentiality will be respected.

Access to school records

Students are entitled to have access to school records containing personal information about them and their progress in school under Freedom of Information (FOI) laws, which exist in all States and Territories except the Northern Territory. This right is backed up by Article 13 (1) of the United Nations Convention, which gives children a right to receive information of all kinds. Some education departments are willing to provide information without a formal FOI request. Where a formal request is required, a letter of request referring to Freedom of Information rights should first be made to the school concerned. If this is unsuccessful a written request should then be made to the FOI officer of the relevant Department of Education.

School uniforms

School uniforms and dress codes are a common source of friction in schools throughout Australia. In a society which places great emphasis on appearance, fashion and style, and where there are strong advertising and peer pressures for young people to be part of the current youth culture, it is not surprising that some students claim the right to express their own personal preferences in their dress and appearance.

Dress and appearance are far more than matters of taste and fashion; they have powerful social meaning. Dress may represent a desire to be different; it may be a challenge to adult authority or values; or it may be a means of gaining peer attention or approval. Schools and school communities have the difficult task of balancing the views of a diverse group of students against those of parents, teachers and community members. Some see the way young people dress as a matter of personal taste and preference and not part of their education. Others believe that the school has a role in setting standards and an interest in students dressing in a way that is neat and unobtrusive. Schools can also argue that they are better able to ensure the safety of students if they can easily distinguish them from outsiders.

Schools are not required to have a school uniform. Some Australian schools allow their students to choose the clothes they wear to school and others have relaxed uniform requirements. But unlike state schools in the United States and Canada, which do not have uniforms, school uniforms have become an institution in Australia. The Convention on the Rights of the Child and the earlier International Covenant on Civil and Political Rights (1966), both of which have been ratified by the Australian government, give all Australians a right to freedom of expression. The way in which a person dresses – the choice of clothing, hairstyle, items of adornment and accessories – reflect an individual's preferences for colour and style. Yet most state and private schools (other than state schools in the Northern Territory) take it for granted that it is within the power of the school to lay down strict rules as to what clothing, footwear, make-up and jewellery can and cannot be worn to school.

At a time when children are more fashion conscious than ever before, they are denied the opportunity to express their taste and their preferences. One is entitled to ask what the educational imperative is that requires schools to dictate the way children dress. Certainly there are arguments in support of school uniforms: that they are cheaper; they avoid competitiveness or embarrassment for students who cannot afford fashion gear; they encourage orderliness and discipline; and they give students a greater sense of pride and loyalty towards the school. But, from a children's rights viewpoint, compulsory uniforms represent a restriction of their freedom of expression and discourage individual choice.

Compulsory uniform codes tend to enforce monocultural and gender-specific rules about dress and personal appearance which might be challenged under anti-discrimination legislation. In New Zealand, the Human Rights Commission upheld a complaint from two primary school girls who were unhappy that the boys at their school could wear shorts but they were required to wear skirts (Youth Law Project, Auckland 1992). The Commission found they suffered practical disadvantages and the school was ordered to allow them to wear culottes or shorts. Similarly, in 1993 an African student attending a school in New Zealand also succeeded under racial discrimination

legislation in changing a school rule which denied her the right to wear her hair braided.

Australian school uniform codes could likewise be challenged by Indian students who wish to wear a sari, or Pacific Island students who seek to wear their traditional dress of a sarong, pareu or lava lava. In a Victorian case, two male students of independent schools made complaints to the Equal Opportunity Board about school rules that required male students to have short hair while allowing female students to wear their hair long. The schools excluded the students from attending classes until such time that they had their hair cut; however, an interim hearing ruled that the students had to be returned to school. The Education Department successfully appealed this decision, only to have it overturned by a higher court. The relevant legislation has since been amended, and the *Equal Opportunity Act* 1994 (Vic) now gives schools the power to breach age and sex discrimination laws in respect of school dress codes and school discipline policies.

It is generally assumed that schools have the power to regulate matters of dress and personal adornment as part of their powers to lay down reasonable rules for the good order and discipline within the school. Western Australian education regulations (Regulation 189a) allow the Minister to give instructions as to dress codes to be adopted by schools and as to ways in which students and parents are to be consulted in determining these dress codes. The personal, social and cultural background of students must be considered and all members of the school community given a chance to express a view before deciding on a school uniform.

The debate is not whether schools should or should not have official uniforms; it is whether the wearing of a school uniform and compliance with school rules concerning a child's personal appearance should be compulsory. With some schools seeking commercial sponsorships, this issue is taking on a new slant. Are we approaching a time when students will be required to wear the logo of their commercial sponsor?

Right to political expression

In this area, too, Australia has fallen behind the United States and other industrialised countries in the recognition of the rights of

students to express their opinions in a non-violent and non-threatening way. The Convention on the Rights of the Child gives children the right to freedom of expression and of thought, conscience and religion, but these rights are made subject to the need for public order and the right of parents to provide direction in the case of children who lack the capacity to make their own decisions. In some Australian States and Territories the right to freedom of expression is backed up by anti-discrimination laws.

The right of black students in the United States to wear arm bands as a protest against their country's involvement in the Vietnam war has been upheld in superior courts (*Tinker v. Des Moines Independent Community School District* (1969)) as has the right of students to support two teachers who were on strike by wearing badges and stickers with slogans such as, 'We want our real teachers back' (*Chandler and Depueg v. McMinnville School District* (1992)). In each case, the Court relied on the constitutional right to freedom of speech, the fact that the protests were not accompanied by any disturbance and that there was no evidence of interference with the school's work or with the rights of other students.

Australian schools regularly ban lapel badges, buttons, stickers or T-shirts expressing a view on an issue seen as political, such as 'Save the Whale' or 'Gay Rights'. Teachers have also been known to ban petitions or posters prepared or circulated by students seeking to change a school policy or support a particular cause. Such bans might be challenged as a denial of the students' right to freedom of expression and their right to receive and impart information and ideas of all kinds under Article 13 of the Convention. In New South Wales, students could additionally rely on Section 6 (1) (c) of the *Education Reform Act* 1990 which requires educators to 'encourage innovation and diversity within schools'.

Religion and religious instruction

Australia allows religious diversity and freedom of religious belief. Our education system is sometimes described as 'secular' without any clear understanding of what this means. In New South Wales, education in government schools is to be 'non-sectarian and secular'. General

religious education, as distinct from dogmatic or polemical theology, is permitted. Education acts in other States and Territories provide for 'religious instruction' during school hours. Section 23 of the *Education Act* 1958 (Vic) is typical. Religious instruction must be given by approved religious instructors and is not compulsory for any student whose parents object. There is no statutory right for a student to object to participation in religious instruction but in most States or Territories anti-discrimination laws would empower students to refuse to participate.

Limits of schools' powers over students

Children attend school for the purpose of education and one would expect that the powers of the school were limited to education and related matters. By analogy with the *Gillick* case, teachers' powers are given to them to enable them to carry out their responsibility to educate students. But schools often seek to extend their powers beyond the school into their students' private, family or cultural lives.

Responsibility for children travelling to and from school

One might assume that it is the responsibility of parents to get their children to and from school and to supervise their behaviour during the journey – unless, of course, the school undertakes to provide transport or supervision for students on their journey to and from school before the commencement of classes or at the end of the school day. A number of legal decisions suggest otherwise.

There are two colourful old English cases that are often referred to and relied on to support the proposition that the hand of the school can follow students outside the school yard. In *Craig v. Frost* 1936, the galloping horse case, it was held that a teacher could punish a student for galloping his horse to school contrary to teachers' orders but with parental permission. It seems that other students on the way to school were endangered or thought to be at risk and the decision might be justified on the basis that a school had a duty to other students. In *R v. Newport Justices* 1929 it was held that a child had been lawfully punished for smoking on his way home from school even though his father had given him permission to smoke.

It is doubtful, however, that these decisions support a general principle that schools can regulate the dress and behaviour of students on their way to and from school. Yet many schools seem to act on this assumption. Students have been suspended or expelled from school for smoking or drinking well away from the school and outside school hours, or for misbehaving on public transport on the homeward journey. Others have been disciplined for eating in the street while in school uniform, smoking in a park en route to school, failing to wear correct uniform, or for acting in a noisy or boisterous manner on the journey home.

Often the fact that the student is in school uniform is treated as conclusive of the question as to whether the student remains under the school's jurisdiction. Yet students, if required to wear a uniform to the school gate, have very little choice but to wear it home. The real issue is: under whose care and supervision is the child at the relevant time? Schools do not usually undertake to supervise students on the journey to and from school unless they provide special transport in the form of a school bus or provide supervision for students crossing busy roads or getting onto public transport.

The 'walking advertisement' argument is also sometimes made. It is argued that even away from the school students are representing, or are seen as representing, the school. Thus students who in a public domain are not in uniform or are untidy, noisy, or bad mannered may bring the school into disrepute within the wider community. A counter argument is that if students are not in uniform they cannot be associated with a particular school, and that by disciplining them for behaviour outside the school, schools are taking on a responsibility which is not properly theirs. There are two separate issues here: Can a school require students to wear uniforms in their own private time and when away from the school campus? If they can, can they discipline students who are in school uniform for behaviour that has nothing to do with their education?

Chisholm (1987) sees the schools as having power where there is a sufficiently close connection between the student's behaviour and the child's schooling. But this is not always helpful. Take the situation of a student who attends a Saturday 'away' game played by a school team

and is given a detention for not being in correct uniform, or the student who is abusive to a teacher on a Saturday in the local shopping centre or deliberately damages a teacher's car at the weekend. A student who slashes the seats on a school bus or behaves violently towards the driver or other students could clearly be disciplined by the school, but what of the student who sprays graffiti on a public bus or commercial building, or assaults other passengers on public transport? The child in all these cases is under the supervision of the parents, not the school. In the latter cases, the behaviour clearly constitutes a criminal act for which police, not the school, have powers to prosecute or issue a caution. Thus, the 'close connection' test here does not readily provide answers.

There is a need for greater clarification of these issues through legislation or policy guidelines. Under education regulations in Western Australia, a school principal is given a specific power to discipline students for behaviour on the journey to and from school (Regulation 28 (2)) but, in all other jurisdictions, there is no clear statement.

Transport and parking

Older children tend to find their own way home whether by bicycle, on foot, by public transport or (increasingly) by car or motor cycle. While schools must surely be entitled to make rules as to the driving and parking of vehicles in school grounds and in close proximity to the school where the safety of other students may be at risk, it is hard to see any legal basis on which they could refuse to allow students to drive to school or require them after school to go straight home. With younger children, the responsibility for their care and supervision lies with the parents; competent older children are able to take responsibility for the journey themselves.

Homework

It is surprising that on such a common and important issue as the power of schools to insist that students complete homework assignments, the law is unclear. Again, the only pointer is an old English decision. In *Hunter v. Johnson* 1884 it was held that a school was not entitled to punish a student for failure to complete homework. Indeed,

the term 'homework' is itself a misnomer; it is in fact school work done at home. Why should schools be able to require students to spend part of their private time doing school work? A school which attempts to do so is intruding into the student's personal, family and cultural life. While students and parents can be set work and encouraged to undertake extra work at home, it is an unwarranted intrusion into the child's private home life to *require* the completion of homework and to punish non-completion. In the absence of a specific statutory power (and there is none in any Australian State or Territory) it seems that schools are overreaching their legal powers. A recent attempt has been made in New South Wales to institute a fixed number of hours of homework required from students of different years.

Corporal punishment

In its 1994 Report *The Progress of Nations*, UNICEF pointed out that all countries that have ratified the Convention on the Rights of the Child are obliged to protect children from 'all forms of physical or mental violence', and that the United Nations Committee on the Rights of the Child has taken the view that smacking children is a violation of the Convention. This reinforces the view expressed in 1992 by the United Nations Human Rights Committee that governments have a responsibility to afford protection to everyone from 'cruel, inhuman or degrading treatment or punishment' under Article 7 of the International Covenant on Civil and Political Rights, and that laws should prohibit the hitting of children by people, whether they are acting in an official or a private capacity. A Table in the UNICEF Report headed 'Is physical punishment illegal?' ranked Australia with the United States at the bottom of the list of 27 industrialised nations.

Many Australians believe that corporal punishment has been abolished in schools in this country. This is not the case. It is permitted in all private schools, and in Tasmania and the Northern Territory it is allowed in state schools. At the time of writing, corporal punishment may be used in state schools in New South Wales unless there is a parental veto. In Victoria, South Australia, Western Australia and the Australian Capital Territory it is banned by education regulations or departmental policy but, in these States and Territories, a teacher

could still rely on the reasonable chastisement exception to the law of assault to defend a prosecution or a civil claim for damages.

Australia is in breach of its international law obligations in not banning the physical punishment of children as part of school discipline. The Federal Government has the power to pass national legislation banning corporal punishment in schools under the foreign affairs powers in the Australian constitution. It has shown no interest in doing so.

Detention

Detention of students after the official school day is a further area in which the powers of the school to impose discipline and punishment on students comes into conflict with the rights of students and parents to choose how to spend their time outside school hours. A student who is held back in detention for half an hour after school may miss a bus or usual ride home or may have to ride a bicycle along a busy road in the rush hour. What case law there is does not support the right of schools to hold students back after school unless there is specific statutory or regulatory authority. Regulations allow Queensland students to be held back for up to half an hour after school (Regulation 35 (b) *Education Regulations* 1988 (Qld)), and in Western Australia there is a general power to hold students back by way of punishment (Regulation 26 (1)). In Tasmania's *Education Act* 1994, a principal may impose a detention on a student for unacceptable behaviour (Section 37 (b)). With younger children, parents may consent to their child being held back, and the school would then have the power by delegation from the parent. Older children might consent to do detention after school in preference to some other punishment, but it is doubtful that there is a general power to detain students against their will.

A school which seeks to extend its control over students outside school hours may find itself saddled with legal responsibility if the student suffers injury, on the basis that the actions of the school have led to increased danger. It is also an invasion of the privacy of the family in that their regular arrangements for the child's care and supervision on the home journey may be disrupted, with inconvenience and dislocation of the parents' lives.

Leaving school

Students who reach the end of compulsory schooling can decide whether to stay on at school or to leave, and this decision cannot be overruled by parents or the school. At 15 or 16 years-of-age the young person is likely to have the intelligence and understanding necessary to satisfy the *Gillick* test referred to previously.

Students cannot be required to leave school on reaching the end of their compulsory schooling. Age discrimination laws in the Australian Capital Territory, Northern Territory, New South Wales, Queensland, South Australia and Western Australia ensure their right to remain at school. In other States, Article 28 (b) of the Convention on the Rights of the Child could be relied upon to establish a right of education until the age of 18 years.

Suspensions and expulsions

All Australian state schools have the power to suspend or expel students from the school for misbehaviour. A child excluded from a school suffers a number of detriments, including disruption to education and a blow to that child's self-esteem. Expulsion is also likely to be felt as a rejection. The language used by students – 'kicked out of school' or 'thrown out' – is an indication that exclusion is seen and felt as a hostile and aggressive act, and many children give up on the education system after being excluded from their school. While Australia has clear-cut procedures and effective remedies for workers wrongfully dismissed from their jobs, the procedures and remedies for students facing expulsion from school are often confusing and unfair. Many young people who have experienced expulsion report feeling a deep sense of grievance (National Children's and Youth Law Centre 1995).

Different criteria and legal and administrative procedures exist in regard to the suspension or expulsion of students in Australia. These will be dealt with only briefly here. In some States and Territories only the Minister of Education has the power to expel; in others the Director of Education has that power; and in yet others a school principal can do so. Even the terminology varies. Short suspensions, long suspensions, exclusions, expulsions, compulsory transfers, declarations

of place vacant or removal from the school roll are all variations on a theme, the finale being that the student is banned from the school.

Some States or Territories draw a distinction between exclusions which terminate the student's right to be educated at a particular school and expulsions which terminate the student's right to education at any state school. In Tasmania, the grounds are not specifically defined, making the interpretation of unacceptable behaviour subjective (Sections 37 (a) and 38 (1) *Education Act* 1994). In contrast, Victoria now has carefully defined objective criteria (Ministerial Order No.1 1994). In some cases departmental guidelines seem to be in conflict with education acts and regulations; in others, the guidelines are inconsistent and hard to follow. In many cases the statutory provisions and the official guidelines are not followed; students may be 'asked to leave' the school, or parents may be asked or persuaded to 'withdraw' their son or daughter. Voluntary withdrawals are not classified as expulsions and are unregulated.

It is well established by case law that, because the consequences of expulsion are serious, students are entitled to a fair hearing. The principles of natural justice apply to school expulsions and require that the student and his or her parents or guardians should be given reasonable notice of the alleged misbehaviour for which exclusion is being considered; should have an opportunity to dispute, explain or comment; and should be able to put forward for consideration relevant evidence and submissions. The decision-maker must act in good faith and on the basis of material put forward and any explanations given. The person pressing for the student's expulsion should not be the person who decides whether the student is to be expelled and there must be some independent appraisal of the situation. The principles of natural justice apply to independent as well as to government schools.

However, case law suggests that an expulsion will be upheld, even if based on a mistake, if the school bases its decision on an honest and reasonable belief in the facts (*McMahon v. Buggy* 1972). If this is the law, then students can be expelled for things they have not done; this is a travesty of justice.

Schools cannot make inflexible rules with automatic penalties for infringement. They must look at the individual student's behaviour in

a wider context and consider the student's personal and family circumstances, his or her previous behaviour at school, and the effect of expulsion on the child's education. Students should not be expelled as an example to other students, and should not be expelled for trivial breaches of school rules, lack of academic ability or behaviour which the student is unable to control (M & R v. *Palmerston North Boys High School* 1990 (NZ)).

Article 12 of the Convention on the Rights of the Child entitles children to have a representative present when administrative decisions are made which affect them. This means that any student facing school expulsion may have someone present to help them put their views forward and to advocate for them. Advocacy in school matters has been slow to develop in Australia but today there are youth workers, legal centres and some private lawyers who are prepared to represent children in such situations.

In no Australian State or Territory is there a right of appeal to an independent body against a school expulsion, but a complaint may be made to the State or Territory Ombudsman on the basis that the procedure was not fair or the principles of natural justice were breached. Overseas, and occasionally in Australia, expulsions have been challenged through the courts. Such challenges have been so rare that there are few pointers as to the standards required of educators in deciding whether a student should lose his or her right to education.

Conclusion

The idea of children having independent rights in education is gradually gaining acceptance in Australia, but there remains considerable resistance from educators and the community generally. Education is often viewed as a privilege enjoyed by students which may be withdrawn if they do not behave appropriately. School students are given few rights in education law and, despite some positive moves, generally have few opportunities to participate in school decision-making, and little influence on curriculum or school policy and discipline.

Rights must, of course, be balanced by responsibilities. If students feel they are treated as individuals of worth and dignity with a part to play both within the school and in the education system, they are

more likely to take responsibility for their own behaviour. Education, in the end, must be a partnership between students, parents and educators. There are signs of a dawning consciousness that children, as the primary consumers of education, should have rights and that educators, as service providers, should recognise these rights.

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6
The Child Protection and Welfare System

Judy Cashmore and Sally Castell-McGregor[1]

'The State, while it respects the liberty of each in what specially regards himself, is bound to maintain a vigilant control over his exercise of any power which it allows him to possess over others. This obligation is almost entirely disregarded in the case of the family relations – a case, in its direct influence on human happiness, more important than all others taken together. It is in the case of children that misapplied notions of liberty are a real obstacle to the fulfilment by the State of its duties. One would almost think that a man's children were supposed to be literally, and not metaphorically, a part of himself, so jealous is opinion of the smallest interference of law with his absolute and exclusive control over them, more jealous than almost any interference with his own freedom of action: so much less do the generality of mankind value liberty than power.'

– J.S. Mill 1859

Many decades after the publication of Mill's celebrated philosophical treatise, we continue to question the extent to which the state, in the form of government and its agencies, can legitimately intrude into the private domain of parent–child relationships in the interests of the individual. While the object of Mill's opprobrium was the right of fathers not to send their children to school, his argument that the state should require and compel certain behaviour has relevance in today's

[1] The views expressed in this chapter are those of the authors and do not represent the position of the South Australia Children's Interests Bureau.

world as the complex relationship between state, family and individual children is debated within the context of individual rights and freedoms.

The negotiation of this three-way relationship and some of its complexities provides the subject for this chapter in relation to a number of current trends and issues in the area of child protection and child welfare. Two main sets of issues concern the reporting, defining and investigation of abuse and neglect and, for some children in the aftermath of such investigation, substitute care. Trends and themes which cover both areas include the development of schemes which aim to prevent children from being separated from their families; the meaning of partnership with parents and agencies; and ways to enable children to participate in the process.

Readers will note that many of the examples used in this chapter to substantiate arguments come from New South Wales and South Australian cases and law. This tendency reflects the knowledge and the experience of the authors. It may be that some of these arguments would be less well sustained by data from other States and Territories. It is our general impression, however, that much of the law and practice throughout Australia would lead to similar conclusions.

Children's rights and child welfare

Historically, children have been viewed as the 'property' interests of parents and guardians, with decision-making powers vested in the latter. The last decade had seen a fundamental shift in this perception; the *Gillick* judgement (*Gillick v. West Norfolk* AHA [1986] AC 112) provided clear direction on the subject of children's autonomy rights and established the important principle that as a child attains sufficient understanding and maturity, parental rights diminish and yield to the child's right to make decisions. The High Court of Australia's decision in *Secretary of Health and Department of Health and Community Services v. JWB and SMB* (1992) 175 CLR 257 (*Marion's* case) upheld the important principle that parents' legal rights over their children are not absolute and some decisions have such important implications for fundamental human rights that a higher authority should determine if they are in a child's best interests.

For the most part, however, parents have considerable autonomy in the way they raise their children. They determine their children's religion; they may, in most circumstances, consent to their children's medical treatment; they select the kind of school they wish their children to attend; and they administer corporal punishment. In the latter instance, the continued 'right' of parents and those *in loco parentis* to use physical punishment, recently highlighted by an international children's rights agency (UNICEF 1994), outweighs the child's right to physical integrity. Acceptance of physical punishment is deeply ingrained in Anglo-Australian culture and law, and any suggestion that this might be limited is controversial and often presented as evidence of undue intrusion by the state into the private domain of family life.

Australia's ratification of the United Nations Convention on the Rights of the Child (the Convention) in December 1990 added impetus to the children's rights/parents' rights debate which has, unfortunately, often been misinterpreted and misunderstood. The potential to use the Convention 'as a political lever particularly to win a greater share of social and economic rights' (Carney 1993), has not been given as much emphasis and publicity as those articles which some claim undermine parental authority.

The legal and societal ambivalence about the status of children *vis a vis* their families, and attitudes towards them as objects of concern or persons without individual independent interests, is reflected in our response to parental maltreatment of children – that being, acts of omission or commission that cause children harm. Children are not abstractions; they are people who are sometimes mistreated by others. The moral and physical integrity of the child is the principal issue in the debate (Castell-McGregor 1992).

Historically, however, the rights of parents are more deeply established in law and tradition than are those of children. As a result, intervention in families on behalf of endangered children is an area fraught with ambivalence. Those charged with the statutory duty to protect the vulnerable do so in a political climate which is strong on family values. Family values are diverse, however, and the International Year of the Family in 1994 has highlighted the need to

develop a national family policy (National Council for the International Year of the Family 1994). Both in the private sphere of family life and in the public sphere, when maltreatment by parents is suspected, the current emphasis is on family support and family integrity. In child protection philosophy and legislation, a shift is occurring (more marked in some States and Territories than others) from a children's rights focus to one of family rights. 'Family preservation' is the current emphasis, and the increasing presumption is one of little or no intervention.

This shift is the result of a combination of several factors. These include disaffection with the child welfare system and its track record as 'parent' (Cashmore, Dolby & Brennan 1994; Human Rights and Equal Opportunity Commission 1989); increasing pressure on the substitute care system; concern that most child protection efforts are directed to children and families after abuse has occurred, rather than preventing the abuse in the first place (Krugman 1995); recognition that prevention is better than cure and makes sense in human and financial terms (National Child Protection Council 1993); and the reality that welfare departments are over-burdened and under-resourced, leading to decision-making which endangers children (Fogarty 1993).

Issues in reporting and investigation

Child protection workers are charged with onerous responsibilities as they struggle to steer a path trying to protect children on the one hand, and preserve family integrity on the other. Two cases in the Australian media in 1992–93 illustrate the 'over' versus 'under' intervention dilemma and the strength of condemnation when things go wrong.

The 'Children of God' case focused attention on a communal religious sect that is world-rejecting and isolates children from society. The grounds for intervention were that the children's psychological and emotional wellbeing and their physical development were at risk by virtue of the sect's alleged sexual activities and child-rearing practices. The means of intervention, by dawn raids and class action involving 128 children in two States, was condemned in the Australian press. The Director-General of the Victorian Department of

Community Services justified the Department's actions in taking protective proceedings in the courts as necessary on children's rights grounds, claiming that: 'As far as we can see, the arguments' in the courts have been in terms of the liberties of the parents to do what they will with their children without any recognition that the children may have some separate rights. The law does give the children some separate rights' (*The Age*, 23 May 1992). The courts determined that the rights of the children were best protected by remaining with their families, and returned the children to them after negotiated conditions were agreed upon.

In contrast, the second case concerned the failure of authorities and individuals to take protective action on behalf of 2-year-old Daniel Valerio, resulting in his death from abuse by his mother's de facto husband. This case shocked the nation and heralded the introduction of Victoria's mandatory reporting laws. At least 21 professionals were involved in Daniel's life; they and many other family friends and neighbours suspected maltreatment, but most did nothing. A study of the events leading up to Daniel's death reveals the familiar pattern that so many child abuse death inquiries uncover: inexperienced front line workers; failure to carry out thorough medical examinations; an optimistic reliance on parental capacity to change; lack of professional coordination and failure to convene a case conference; and the wish of authorities to keep a parent 'on side'. Further, in Daniel's case, the pursuit of evidence that would stand up in the Children's Court added delay to an already urgent case (Ministerial Panel of Inquiry into the Death of Daniel Valerio 1991).

It is interesting to reflect on the outcome of the Children of God action, and the circumstances leading to Daniel Valerio's death. In the former case, no individual child was the focus of protective action and the evidence was, to an outside observer, of the 'smoking gun' variety. In the case of Daniel Valerio, there was considerable evidence of injury and other indicators, such as parental collusion, that should have alerted the professionals involved. Was the response to Daniel's physical state indifferent because those dealing with his family did not want to believe his injuries were non-accidental? How could an assessment of 'significant harm', as defined in Victoria's *Children and*

Young Persons Act, be arrived at in the former case but not the latter, where the concern of certain health professionals was that the physical evidence was insufficient? Is the physical assault of children more acceptable or, as several studies have reported, less likely to be seen as serious and as abuse (Winefield & Bradley 1992; Zellman 1990)? The confusion caused by legal definitions was one of the many issues highlighted by a recent Victorian report addressing child protection services in that State (Fogarty 1993).

Redefining abuse and neglect

The ambivalent responses of statutory authorities to child abuse and neglect is also apparent when it comes to definition and reporting. A critical question concerns the definition of abuse and neglect. The Australian Institute of Health and Welfare (Angus & Zabar 1994) defines these as follows:

> 'Child abuse or neglect occurs when a person, having the care of a child, inflicts, or allows to be inflicted, on the child a physical injury or deprivation which may create a *substantial* risk of death, disfigurement, or the impairment of either physical health and development or emotional health and development. Child abuse or neglect also occurs when a person having the care of a child creates, or allows to be created, a *substantial* risk, of such injury, other than by accidental means. This definition includes sexual abuse and exploitation of the child.' (p.28, emphasis added)

How is 'substantial' to be determined and by whose standards? Does this mean that there is a degree of harm that is acceptable in our community, and that the only concern is severe harm? If so, this is in direct conflict with Article 19 (1) of the United Nations Convention, which requires the state to:

> '... take *all* appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.' (emphasis added)

Is the parent who refuses to have a child immunised guilty of neglect, as has been suggested in some quarters? (Professor Watson, cited in *The Adelaide Advertiser*, 14 June 1994). Does witnessing violent assault on a parent constitute emotional abuse (Blanchard 1993; James 1994)? At what point does the current legal acceptance of 'reasonable' physical punishment cross the boundary and become abuse?

A further question relates to the extent to which the dominant culture should take account of the cultural practices of minority groups. Should the 'beating' of Aboriginal young people for offences against property, for instance, constitute acceptable traditional punishment (*The Adelaide Advertiser*, 16 June 1994)? Is the circumcision of male baby boys, now questioned and regarded by some as an infringement of children's rights, abuse or not? Female genital mutilation has received considerable media attention, and the consensus is that this practice cannot be tolerated whatever the cultural arguments. Both practices involve the removal or mutilation of healthy body parts, and both practices contravene Article 24 (3) of the Convention.

So how does this sit with statutory requirements under child welfare legislation? The *Children's Protection Act* 1993 (SA), for example, enjoins all those exercising powers under the Act to observe cultural sensitivities in giving consideration to: '... preserving and enhancing the child's sense of racial, ethnic or cultural identity, and making decisions and orders that do not contravene racial or ethnic traditions or cultural values.'

The challenge facing statutory child protection agencies is to ensure that definitions of child abuse and neglect are not so broad as to encompass vague notions of risk, nor so narrow that vulnerable children fall beyond rigidly defined criteria. Throughout Australian jurisdictions, there are considerable differences in legislative definitions of child abuse and a 'child in need of care', and even differences in definitions of a 'child'. For example, there has been a reluctance to define homelessness as 'a risk factor'. If the state chooses not to intervene, then it abrogates its responsibility to young people badly in need of services and support. In South Australia, after considerable debate and pressure from the youth sector, the *Children's Protection Act* 1993 (SA) (Section (2) (e)) included homelessness as a

definition of risk if the child were under 15 years-of-age and of no fixed address. Does this mean that a child of 15 or 16 years who is homeless is not at risk?

The temptation, of course, is to redefine core business to cope with economic constraints; a narrow interpretation of risk means that fewer children are deemed to be at risk and therefore not subject to proper investigation. Such a trend is apparent in South Australia, where under Section 14 (a) (b) of the *Children's Protection Act*, the Chief Executive Officer of the Department for Family and Community Services is charged with investigatory powers, but need not follow up an abuse notification if the grounds for suspicion are not 'reasonable', or are reasonable but 'proper arrangements exist for the care and protection of the child and the matter of the *apparent* abuse or neglect has been or is being adequately dealt with' (emphasis added).

How is it to be determined if 'proper arrangements' have been made for a child's care and protection, and the 'apparent' abuse or neglect dealt with? The question is particularly relevant as the workload on child protection agencies exceeds the ability to allocate cases. For example, in one State, letters are sent to parents in some locations (following notification in 'lower priority' cases) advising them to attend an office interview to discuss matters raised (Ovenden et al. 1994). From a children's rights and welfare perspective, this trend is disturbing and requires close monitoring. Who does the monitoring is a pertinent question.

At the same time as statutory authorities are examining their definitions of child abuse and neglect, reported cases continue to rise. State and Territory welfare departments received 53,296 reports of child abuse and neglect during the period from 1 July 1991 to 30 June 1992, representing a 7 per cent increase over the previous year (Angus, Wilkinson & Zabar 1994, p.1). With the exception of Western Australia, all States and Territories have mandatory reporting legislation to varying degrees. In some, either a few designated professions or all professions involved with children are required to report. In others, such as the Northern Territory, anyone who has reason to believe that a child may be abused or neglected must report to the Department of Health and Community Services or the police.

Who should be required to report, when, and in what circumstances are matters of continuing debate. It is generally believed that much more abuse of children occurs than is reported. Recent research indicates that the likelihood of reporting depends upon the type of abuse and the child's situation. A recent national survey found that adult respondents who deemed various scenarios to be very harmful were much more likely to report severe sexual and then physical abuse to the authorities than severe emotional abuse and neglect (National Child Protection Council 1994). In relation to children disclosing abuse, older children are more aware of the implications for themselves and their families, and find it difficult to approach authorities (Kids Help Line 1993). Studies also show that incidents of abuse involving children with a disability are rarely reported to child welfare or law enforcement authorities, as investigation and evidence pose problems (Sobsey & Mansell 1994).

Ethical dilemmas

Reporting does bring with it ethical dilemmas. What is the impact on children and families? Will it be negative or positive? What if the child or young person who is the subject of the report does not wish further investigation and wishes confidentiality to be maintained? Is it ethical to report when resources are stretched to the limit and necessary services are not available? What is the knowledge and experience of the workers making the decision to investigate or not? How do they make their decision? Is it ethical to put children through a gruelling assessment and possible court process, particularly in sexual abuse matters, when the legal system's response is so poor? These are salient questions.

Under- and over-reporting

In the American context, it has been argued that the 'twin problems' of under- and over-reporting must be addressed through the provision of better public professional education on child abuse and neglect by child protection agencies, and a better ability to screen inappropriate reports. It is argued that over-stretched protective services waste time investigating inappropriate cases that are not substantiated, at the

expense of genuinely endangered children who are not picked up and therefore do not have their risk reduced. The result of the former is sometimes construed as a massive and unjustified violation of parental rights (Besharov 1993).

The counter-argument is predicated on the belief that children and parents have different interests at stake in these matters and under- rather than over-reporting is the problem. 'What may be intrusion for the family may be rescue for a child' (Finkelhor 1993). Finkelhor sees dangers in trying to minimise the problem and argues that in many unsubstantiated cases workers cannot come to a decision, and as many as 25 per cent of these children will be re-reported. He also takes issue with claims that the investigation of reports will be traumatic for the family, citing a comprehensive North American study that shows customer satisfaction with the process of investigation. Finkelhor and Besharov agree, however, on one thing: that well-trained and well-resourced workers are an essential prerequisite for any effective child protection service. Finkelhor (1993, p.285) concludes that 'if we have nothing to offer when abuse is reported it is silly to argue about whether we are reporting too little or too much'.

Suspicions about the efficiency and impact of mandatory reporting and doubts about the ability of 'the system' to respond properly also inhibit reporting (Crenshaw, Bartell & Lichtenberg 1994; Sandor 1994; Winefield & Castell-McGregor 1986; Zellman 1990). There is a paucity of Australian research on the impact on families of reporting child abuse and neglect, and practical difficulties, particularly the ethics of confidentiality, make such studies difficult. We know from Australian research that there is a lack of detailed outcome information on case files (with most feedback being anecdotal) and there is an associated risk of high worker disillusionment or attrition (Winefield, Harvey & Bradley 1993). A South Australian study on the substantiation of reported child abuse or neglect, while finding the ratio of substantiated to unsubstantiated cases to be similar to that in comparable child protection systems, noted that severity ratings by intake workers were 'mysterious' with, for example, four out of five cases of skull fracture being rated as 'moderate' rather than the expected 'severe' (Winefield & Bradley 1992).

Such findings have fundamental implications for children's rights to bodily integrity and for appropriate training for front-line child protection workers (Besharov 1993; Finkelhor 1993). There is no substitute for practice, wisdom and experience which, in turn, lead to competence and confidence. Failure or reluctance to report abuse or neglect of a child because of a perception that it will lead either to no action, inadequate action, or to a poor outcome, or limiting investigations by screening out cases, contributes to society's denial of the extent of the problem and leaves children unprotected.

Trends and issues in substitute care

The strongest intervention the state can take in family life is to remove a child and assume guardianship. For a small proportion of children each year (15 per cent in 1992), substantiated allegations of abuse result in children being 'admitted' to a care and protection order and, in many cases, being removed from home (Angus, Wilkinson & Zabar 1994; Angus & Zabar 1994). Most (59 per cent) of these orders were guardianship orders; for these children, legal guardianship was transferred from their parents to the state, with the statutory authority assuming total responsibility for the child's welfare. The remaining orders were non-guardianship orders giving the statutory authority or welfare department responsibility for a child's care or protection (Angus & Zabar 1994, p.3).

Over the last decade there have been a number of significant trends in the population of children in substitute care. Firstly, the propensity of the state to take over legal guardianship and to maintain care and protection orders has changed over time and varies from State to State or Territory. In most States and Territories, the number of children admitted to guardianship has declined since the early to mid-1980s, down in most cases to about a third of the earlier peak figures.

Secondly, there has been a trend towards non-guardianship orders and away from long-term guardianship orders. For example, while 74 per cent of children in care in 1992 were under state guardianship, only 59 per cent of children admitted to care and protection orders in that year were admitted to state guardianship. Furthermore, where guardianship orders are used, they are more likely to be short-term than long-

term orders. A decade ago it was very common for children to be placed under guardianship until they reached 18 years-of-age, but it is now quite uncommon. As Fogarty (1993) points out, the pendulum has swung, and the concern now tends to be about the reluctance of welfare authorities to remove children when needed, in contrast with earlier criticisms that they intervened too readily (Carrington 1993).

The third trend is an increase in the average age of children in care. This is probably a result of the more recent policy of 'last resort' for care and protection orders, and the ageing of the children taken into care over the last decade. Of children now in guardianship, the largest group (55 per cent) is aged between 12 and 17 years. This has, and is creating, significant difficulties because adolescents are the most difficult group to place (partly because they are frequently emotionally disturbed), and because there is a severe shortage of places for their age group. This is despite the fact that a number of adolescents in need of care are not receiving the services they require.

Fourthly, following overseas trends, two nationwide shifts are occurring in the provision of substitute care for children. These are a shift away from residential or group home care towards foster care and relative care, and a shift from departmental provision of care towards non-governmental service delivery, sometimes referred to as 'privatisation' of care (Sawyer & Dubowitz 1994). Currently, the most likely placement for children in substitute care in all States and Territories except Victoria is foster care (56.6 per cent), managed either by the statutory authority or by private agencies. Other options include living with a parent or relative (19 per cent) or in residential care or group homes (16.1 per cent). In New South Wales, for example, the number of children under departmental supervision living with their parents or other relatives has increased from 841 in 1990–91 to 1638 in 1993–94, and is forecast to be 2000 in 1994–95. Similarly, the number of children in funded non-government agency care has increased from 23 per cent in 1990–91 and is forecast to be 29 per cent in 1994–95 (New South Wales Department of Community Services 1994).

In both of the above-mentioned cases, it seems that the shifts are ideologically and economically driven. Increasing the number of children in care living with their parents or other relatives, and in

foster care rather than residential care, is consistent with the push for family restoration and fits neatly with economic imperatives (given the increasing costs of child protection and substitute care, and the ascendancy of economic rationalism). Similarly, shifting the provision of services to the non-government sector is also in line with existing government policy and is likely, from the government's position, to be economically advantageous.

What do these changes mean for children?

These trends are significant for the effects they have on children in care. The move to placement as a 'last resort', the shortage of placements, the use of shorter orders, and the shift away from residential care will be dealt with in turn.

Placement as a last resort

While it is obvious that children should only be removed from their homes as the last resort, the relative lack of early intervention (except for a few innovative programs) and the shortage of family support programs and respite care means that children are often older and generally more emotionally disturbed (and hence more difficult to manage), by the time they enter out-of-home care (Szwarc 1993; Urquiza et al. 1994). With more difficult children in their care, foster carers are increasingly expected to play the role of 'parent-therapist' and to be involved in 'inclusive' foster care arrangements, which encourage contact with the children's natural parents (Goddard & Carew 1993; Steinhauer 1991). Their changed role has not, however, been accompanied by a corresponding increase in remuneration, status, recognition or training, and occurs at a time when foster carers are already in short supply (Cashmore, Dolby & Brennan 1994).

Shortage of placements

The chronic shortage of suitable placements, especially for adolescents and emotionally disturbed children, has its own consequences. It means, for example, that the pool of foster carers is very restricted, limiting the ability of workers to match children to appropriate foster carers, and increasing the chances of placements breaking down. The effects of placement breakdown and multiple placements for children

in care have been clearly documented and include an impaired 'capacity for relationships, antisocial and asocial behaviours, chronic depression and low self-esteem, exaggerated dependency, and the tendency to compulsively, though unconsciously, evoke from the new environment a repetition of the original rejection' (Steinhauer 1991, p.367).

Use of shorter orders

The move to shorter care orders was a deliberate move to prevent 'welfare drift' by forcing the case to return to court for review, which has distinct advantages in the absence of appropriate monitoring review mechanisms. The unintended consequences, however, may be a feeling of impermanence and an effect on the success of the placement. As research on permanency planning has shown, the critical factor is not so much the permanency of the plan or placement, but the child's and the foster parents' perception of its permanence (Steinhauer 1991). This may partly explain why foster children who are adopted do better than children who remain in long-term foster care. This in turn raises the issue of adoption of foster children. An unfortunate result of organisational restructuring and the move to employing generalist workers has been the lack of action in relation to adoption, even where there is no prospect of restoration and where both the child and the foster parents wish adoption to go ahead. In many cases, the only impediments are the worker's lack of time and knowledge to do the required work, and perhaps a deep-seated ambivalence about taking steps to terminate parental rights.

Shift away from residential care

The move away from residential care has highlighted the lack of provision for the most difficult and oldest children. As Berridge and Cleaver (1987) point out, a range of different forms of care is required, and residential care has an important role 'in preparation for fostering, in dealing with the aftermath of unsuccessful family placements, and in sheltering ... children who cannot or will not live in another household'. Family group homes may also provide the only means of keeping siblings together, an important factor in the outcome of out-of-home care. The other concern is that we seem not to be learning

from past mistakes. As Berridge and Cleaver (1987) conclude in their authoritative study:

> '... we would question the wisdom of restricting options for the placement of children in care ... What is even more disconcerting, perhaps, is the way in which Departments not infrequently embark on particular courses of action without detailed, local information on the effectiveness of alternative services ... Moreover, many of the problems in our child care system stem from such "lurching back and forth" between what should be complementary approaches.' (p.181)

Similarly, in relation to care by relatives, it is important to maintain a flexible approach and to consider this as one in a range of forms of care; but again, such options need to be evaluated (Sawyer & Dubowitz 1994). Furthermore, it seems clear that such choices should not be made on the basis of economic or ideological grounds, and neither should such placements be unsupported. As Berridge and Cleaver (1987) point out, it is 'frequently over-optimistic, if not naive' to expect that 'damaged children can be accommodated in an "ordinary" family environment – with a limited degree of preparation and, perhaps, four or five visits a year from a benign social worker ... It would seem particularly inappropriate for children with long and complex care histories' (p.183).

Other problems faced by children in care

Two other issues are assuming or likely to assume increasing importance, although there are not always figures to indicate trends. The first issue concerns abuse in care, and the second, the need to provide for young people leaving care.

Ironically and tragically, children removed from their homes because of abuse or neglect are sometimes further abused or neglected in the very system that is supposed to protect and care for them (Benedict et al. 1994; Cashmore, Dolby & Brennan 1994). The incidence of such abuse in Australia is largely unknown with few reliable figures available, and until the recent exposure of past abuses in church schools and institutions, the possibility was hardly acknowledged. There is a need for more Australian research in this area.

A second area that has been largely overlooked is the issue of young people leaving care after a history of state intervention, with little preparation or help. Although they are more vulnerable than young people living with their own families, who tend to leave home later and often return several times before finally leaving the family home, they are 'pushed' into independence at a relatively early age (18 years). Until recently, few programs existed for these people; however, several States and Territories are now in the process of developing programs and the New South Wales Department of Community Services is funding a longitudinal study of wards leaving care to see how they cope with the transition and what help might be needed.

Trends and themes in child protection and welfare

Family preservation schemes

As a result of the sorts of problems just outlined in relation to substitute care, the current emphasis in child welfare policy and practice is 'family preservation'. Family preservation services are intensive 'in home' support programs, usually for a brief period (1–3 months), aimed at preventing 'out of home' placement for 'at risk' abused and neglected children. The best-known example is the Homebuilders program, developed in the United States, and modelled initially in Australia as the 'Families First' program in Victoria (Scott 1993b). Similar programs are being developed in South Australia, Queensland, Western Australia, and the two Territories; New South Wales has recently launched two pilot schemes with accompanying evaluation (Bath 1994). In essence, what family preservation programs offer is 'best practice' on an intensive but limited basis, with 'characteristics that are lacking in many of our current programs' (Bath 1994, p.14). For example, they provide for immediate intake, small case loads, virtually unlimited and 24-hour contact (over a short period), links with established services, flexibility and a range of services.

Family preservation schemes have engendered considerable controversy, with some passionate advocates, a number of sceptics, and some opponents. They are politically attractive, appealing at the same time to conservative concerns about state intervention in family life and the need to support families, and to liberal concerns about support

for the disadvantaged (Bath 1994; Gelles 1993). Importantly, they are also promoted as being cost-effective by preventing unnecessary placements for children in out-of-home care. Family preservation therefore ties in nicely with the present 'family values' push in Australia, the trend towards non-intervention, and concern about cutting costs.

Scepticism and ambivalence about the benefits of family preservation are a result of several factors. Firstly, these programs have inevitably aroused some resentment among existing services because they allow workers the time and resources to do 'real' case-work rather than investigation, referral and closure. Secondly, the results in the United States have been mixed, and there is concern about the appropriateness and applicability of such schemes in the Australian context where placement rates are considerably lower than in the United States, and where family support in terms of health, income maintenance, and family support schemes is much more developed (Scott 1993b). The key assumption of these family preservation schemes is that a significant number of children are placed unnecessarily (Bath 1994, p.12).

This assumption, however, is questionable given that the number of children in care has decreased while the number of notifications has increased. Indeed, the concern now is that children are remaining in homes where they are unsafe (Castell-McGregor 1992), and that such programs run the risk of providing hard-pressed workers with a 'soft option', rather than making the hard decision to remove the child. Justice Fogarty (1993) noted in his recent report on Victoria's child protection system, for example, workers' concerns that undue emphasis on the child remaining within the family at the expense of the child's protection was making children's rights subservient to those of their parents: 'The concern now, however, is that the pendulum may have swung too far the other way and that there is a failure to take action to remove a child where that is necessary and that undue primacy is placed on the "rights" of parents' (Fogarty 1993, pp.86–93).

Preventing placement should therefore not be the only or even the most important measure. As Scott (1993b) pointed out: 'We would be well advised to develop multiple outcome measures which are

clinically driven rather than managerially driven. "Is the outcome better for this child?" is not necessarily the same questions as "Was placement avoided?" ' (p.9).

What we need to know, then, is what works best for which families? What are the long-term developmental outcomes for children living in the targeted families? Which children are more likely to be damaged by inappropriately delayed placements? At what point should these services be offered? At this stage, we have only preliminary answers to these questions (De Panfilis & Scannapieco 1994), and the most cogent criticisms in Australia relate to the timing of the intervention, and the need for earlier preventive intervention.

Partnership

'Partnership' has become something of an 'in' word in the child welfare system. There are partnerships with parents, foster carers, with federal and State and Territory government departments, and with the non-government sector. Several factors provide the driving force. These include a consumer orientation, encouraged by the 'user pays' approach to services, the ascendancy of family ideology, and the increasing recognition that the state may 'get it wrong' both in making the decision to remove children and in delivering services to children in care (Braye & Preston-Shoot 1992). While the rhetoric associated with 'partnership' and 'participation' has some appeal, these concepts are difficult to put into practice, not least because they tend to mean different things to different people. In the context of protecting vulnerable children from harm, some analysis of the meaning of partnership is called for.

Partnership with parents

Following the focus on parental responsibility in the *Children Act* (UK) 1989, partnership between parents and public authorities is perhaps the key relationship. While partnership does not necessarily 'mean equal power', it is about sharing information and a 'reappraisal and realignment of power relations' (Braye & Preston-Shoot 1992). There are, however, a number of barriers or disincentives to partnership with parents. Firstly, parents facing the possible removal of their child come

to the partnership from a position of powerlessness and personal distress, often 'compounded by a service which denies choice and dignity and is underpinned by the threat of compulsion' (Barker 1991, cited in Braye & Preston-Shoot 1992).

Secondly, professional defensiveness and the 'top-down' nature of bureaucratic organisations restrict 'the openness, accessibility and freedom to negotiate required for partnership' (Braye & Preston-Shoot 1992). Thirdly, there is a danger to partnership, if the need to help or rescue blinds the well-intentioned worker to the realities of the child's circumstances. Dingwall, Eekelaar and Murray (1983), for example, describe how professionals feel the need to think the best of parents; that, whatever their acts, they love their children. It is, they claim, this 'rule of optimism' that most inhibits state intervention.

While the emphasis is often on keeping the adults on side by giving in to their demands, 'the one more chance' syndrome can have tragic consequences as workers persevere in their efforts to change highly disturbed family relationships which are damaging to the child. Confusion and ambivalence often result from trying to protect children from the excesses of their adult caretakers, while respecting family autonomy and upholding the belief that families should be kept together or reunited at all costs. The result is a tendency to lurch between two conflicting philosophies, which means in the end that children are not fully protected, and the notion of family autonomy is not fully upheld (Dingwall, Eekelaar & Murray 1983). On the other hand, creating a 'them-and-us' division without respect for parents is hardly productive. What is needed is a clear focus on the child's rather than the adults' interests when the family and statutory workers enter into negotiations.

Agency partnership

Governments rely on the non-government sector to provide a range of services from intensive family preservation programs through to substitute care. The non-government sector, in turn, depends to varying degrees on government funding to do this. The main concern here is the question of responsibility and accountability. If, as we have argued, the state has ultimate responsibility for protecting the rights of vulnerable children, there is a danger that this will be abrogated as

more services are shifted to the non-government sector or privatised. The 'pass the parcel' trend in child welfare, whether managed by the private or government sector, can mean that no one actually takes responsibility for monitoring the child's safety and wellbeing, usually because one agency believes this to be another's responsibility (Cashmore, Dolby & Brennan 1994). This factor has been a consistent finding in inquiries into the deaths of children known to child protection systems (Reder, Duncan & Gray 1993).

In the quest for partnership, it can be forgotten that the statutory child protection authority has the ultimate responsibility and authority. As these authorities themselves rationalise their services and 're-define core business', so the non-government sector increasingly fills the breach. Interestingly, in New South Wales, the shift in the provision of out-of-home care from the government to the non-government sector (promoted in the Usher Report (Ministerial Review Committee 1992)) was justified by a presumed conflict of interest as a result of the same organisation being involved in both service delivery and monitoring.

The main problem, however, is not that the provision and monitoring are carried out by the same organisation, but that there is little monitoring or review of children in care. It is ironic that the competition for resources is between the cases being investigated following notification, and the children already in care. For example, Scott (1993a) commented in relation to organisational restructuring in Victoria and the integration of pre-court child protection investigation and post-court supervision: '... the increasing rate of child protection notifications and the priority given to a quick response to these cases is leading to a decrease in service to the children who are already on orders' (p.7). From the experience of generalist child protection workers in New South Wales, this could have been predicted.

The changing relationship is also not without danger to the non-government agencies, whose very dependency on government funding can raise new ethical dilemmas. Agencies which find themselves out of kilter with the prevailing popular philosophy of the day may find their funding under threat, or that the funding may depend on outcomes favourable to the funding body. Notions of partnership become abstractions in such circumstances.

What do partnership and participation mean in practice?

States and Territories throughout Australia have reviewed, or are reviewing, their child protection legislation, and the principles of partnership with parents and the latters' participation in child protection decision-making processes are being embraced. These principles are, of course, fundamental to good professional practice; the question is the extent to which they are embodied in statute law, and to what extent they negate the individual rights of children. Of major interest is the New Zealand concept of Family Group Conferences, an integral part of the New Zealand *Children, Young Persons and Their Families Act*. Largely a response to Maori and Pacific Islander concerns that the law had failed to recognise traditional decision-making, the Act's emphasis is on family participation and responsibility.

South Australia is one State that has codified parental participation in child protection decision-making by adopting the New Zealand approach. The Family Care meeting is the pivot on which the *Children's Protection Act* 1993 (SA) revolves. Unlike the New Zealand Act, however, the South Australian legislation does not contain essential checks and balances, such as a Commissioner for Children who would monitor the legislation's impact.

The main concern, however, in relation to the concept of partnership and Family Group Conferences, and indeed in relation to all decision-making processes in child protection and child welfare, is the capacity for the child's voice to be heard. While paramountcy of the child's best interests remains the principal issue, the involvement of professionals is diminished and children's individual rights are subjugated to those of the family (Freeman 1992). Significantly, the one group rarely mentioned as being a party to partnership is that of children themselves. Instead, they continue to be seen as 'objects of concern' rather than as individuals with a right to participate in the process.

Should the children have a say?

There are several reasons why children's voices are not always heard in Family Group Conferences, and why such models hold dangers for children in cases of serious child abuse.

Firstly, it cannot be assumed that the child's interests will be protected by their parents or by other relatives or adults present. Professionals involved in child abuse matters frequently encounter minimisation of the abuse by extended family members, collusion and a readiness to protect a perpetrator, even though an infant or a vulnerable young child is by their denial sometimes condemned to remain in a damaging or potentially life threatening situation. There are also power imbalances between family members. In cases of serious child abuse, parents and extended family members can be in extremely conflictual relationships. Consequently, family members may be reluctant to share with one another their difficulties, and seek to keep the problem confidential so far as the wider community is concerned.

Secondly, children are rarely in a position to protect their own interests, even if they are mature enough to do so. Few children are likely to feel able to withstand family pressure and speak openly about their experiences and wishes in a group conference situation. Likewise, if the adults 'do deals' with each other or with the child during private discussions, this can work to suppress information detrimental to the child's interests. The more serious the abuse, and the greater the feelings of shame, guilt or fear of consequences experienced by adult family members, the greater this problem of child disempowerment is likely to be.

Thirdly, one must seriously question the notion that, in the case of child protection matters, the statutory welfare authority can promote the child's independent interests and rights while at the same time being bound by a duty to assist and keep families together in the all-embracing philosophy of family preservation. Conflicts of loyalties and the more powerful demands of parents and their advocates leave such children in extremely vulnerable situations. The results can be devastating; children must have an effective and independent voice in proceedings so vital to their safety and wellbeing.

Fourthly, the presence of an effective and independent voice for children is often problematic, for child advocates (where they exist) may be very restricted in the role they can play. For example, under the South Australian *Children's Protection Act*, child advocates must be invited to attend the Family Care Meeting, but they have no authority

and do not have to be contacted to confirm the Family Care Meeting's conclusions. In effect then, the advocate is unable to represent the child or put forward the child's views. For those who uphold the principle that children are individuals with individual rights and interests, the Family Care Meeting is flawed, particularly in cases of serious child abuse.

It is perhaps timely to reflect on the words of New Zealand's former Commissioner for Children, Dr Ian Hassall. In his independent report to the New Zealand Government (Hassall 1993) on the circumstances leading to the death of a 10-year-old Pacific Islander child (Craig Manukau) who was known to the statutory welfare authority, the Commissioner concluded that the case clearly illustrated the need to have at least one person thinking and acting on behalf of the child or children during proceedings – especially those where crucial decisions are made. He wrote:

> 'It may seem obvious that in child protection proceedings the social worker will fill that role but this did not happen in the present case. If during the Family Group Conference one person who was capable of doing so had been nominated to take the children's part, that person would have seen the serious danger the children were in and not fudged that danger with the concerns of the adults of which there were many. Nor is it clear whether the person appointed by the Family Group Conference to monitor had an appropriate child protection focus ...
>
> It is not that other considerations should be ignored but bitter experience shows that, over time, these considerations tend to take over. The whole purpose of the intervention, which is the safety of the child, is lost sight of unless the social worker or some other competent person with the power to return proceedings to this focus does not deliberately and repeatedly bring forward the slogan, "the child must be made safe now".' (Hassall 1993, p.16)

The child's right to be heard

Article 12 of the United Nations Convention on the Rights of the Child confers on children the right to be heard in judicial or

administrative proceedings, either directly or by representation. In reality, however, decisions are frequently made by professionals, with children's views neither asked for nor given serious weight. Children are usually the passive recipients of whatever decisions are made on their behalf by powerful adults, caused in part by children's dependency and by what has been described as 'entrenched processes of domination' (Freeman 1992).

The need for children to be heard can be clearly demonstrated. Indeed, it can be argued that the lack of a voice for children is a major factor in children being abused further by the system (Cashmore, Dolby & Brennan 1994; Mason 1993). Despite the best intentions of interveners, children allegedly abused or neglected often suffer from the unintended consequences of attempts to help. They may be unnecessarily removed from home or not adequately protected; procedures may drag on for an unreasonable and damaging length of time, leaving children 'in limbo'; and rehabilitative efforts for the family may be ill-considered or poorly delivered. Children may spend much of their young lives drifting in and out of foster care; children may be, and sometimes are, abused in alternative homes found for them by the state, thus substituting public abuse and neglect for private abuse and neglect.

Advocacy for children

Advocacy for children involved in civil proceedings through mechanisms such as the Children's Court and Family Court, is one way of protecting their interests. How this can best be done and by whom are matters of continuing debate (Castell-McGregor 1993). Duquette (1991) has identified six models of child advocacy:

(1) the Befriender, usually a lay visitor, who is apart from the formal system and assists the child but has no statutory power;
(2) an Ombudsman, who acts when called upon to do so, usually in response to a complaint. The 'power' of the Ombudsman's position is the capacity to make public any deficiencies within systems;

(3) the Official Guardian/Solicitor who is charged with furthering the child's best interests and acts when invited to do so;
(4) the Guardian *ad litem*, who is a non-lawyer appointed by the Court to represent the child's best interests and, in some child welfare legal systems, instructs the child's separate representative. The independence of the Guardian *ad litem* is an issue as is the limitation of the role which is confined to court proceedings;
(5) the Lay advocate, who in the United States fulfils an advocacy role for children in family law and child protection proceedings and increasingly in other jurisdictions such as education;
(6) legal representation.

The pros and cons of the various models have been the subject of considerable discussion (Bross 1987; Castell-McGregor 1993; Freeman 1992; Ray 1993; Rayner 1993; Thompson 1993). Effective child advocacy shares some common features: the child must be served continuously by one person throughout any legal or administrative process which concerns them; advocates must be independent and separate from the government agency dealing with the child; advocates must have the legal authority to pursue and achieve the best outcome for the child with the ability to follow up when needed; and advocates must possess the training and skills necessary to communicate effectively with children (Bross 1987; Cashmore 1991). There is increasing recognition that lawyers do not have the training to interview children (Bross 1987; Cashmore 1991), and there are dangers attached to them making their own assessments about children's best interests.

On these criteria, child advocacy in Australia is clearly inadequate. Only in court proceedings are children routinely represented, but even then the system of legal representation does not meet the above criteria. Continuity, follow up, the selection and training of lawyers, and the lack of guidelines as to what role lawyers play in representing children are all problematic. We might perhaps follow Britain's example and seriously

examine the guardian *ad litem* model of dual representation for children in court proceedings, a model which addresses the dichotomy in 'best interests' and advocacy of the child's wishes.

In non-court forums such as case conferences and reviews that make decisions about children at risk, only South Australia has mandatory provision for child advocates. Their role, however, is not defined and neither is it specified who the advocate may be. This, combined with the advocates' lack of authority previously referred to, reinforces the powerlessness of children that Freeman (1992) is concerned about.

Although New South Wales has recently established by administrative fiat a child advocate position, responsible to the Minister of Community Services, it is reasonable to ask how one person is to discharge the broad duties attached to the position. Furthermore, the New South Wales office does not act for individual children. The Office of Youth Advocate in the Australian Capital Territory, now absorbed into the Community Advocate's Office, also receives notifications of child abuse but does not have a sole child advocacy function and is involved in child protection service delivery. Its role is therefore confused.

Australia needs to give much more attention to ways in which advocacy for vulnerable children can be implemented, and to examine the efficacy of various models of child advocacy (Bross 1987; Castell-McGregor 1993; Freeman 1992; Rayner 1993; Thompson 1993). There is a need for a clearly articulated and accessible complaints structure to be made available to all children in state care. There is a need to establish designated offices, such as a Commissioner or Children's Ombudsman, with a clear complaints mandate. There is also a need to develop avenues for young people to present their own concerns. The establishment of associations such as the Australian Association for Young People in Care (AAYPIC) is a promising move. The challenge for the future is to find and develop ways to give children a voice, not merely as lip service, but with a view to genuine participation and empowerment.

Accountability, confidentiality and public interest

The issues of accountability, monitoring and review are fundamental principles in public administration, and are critically important in the

field of child protection and child welfare. They are vital to ensure that standards are observed; that appropriate information is fed back to management to improve the quality both of decision-making and policies (Cashmore, Dolby & Brennan 1994); and that the public can be confident that children's rights and interests are properly protected.

Several factors, however, limit accountability and the effectiveness of review and monitoring mechanisms. Most obvious is the lack of appropriate review and monitoring processes for children involved in the child welfare system. While the court operates as a 'gateway' for children being admitted to care and protection orders and entering out-of-home care, the mechanisms for monitoring and review beyond the court process are generally quite limited and, in some States and Territories, seriously deficient. Carney (1991), for example, stated that: 'NSW law is seriously defective both in conferring such sweeping powers in the first place, and in not providing for routine checks and balances on the Department in its exercise of these and other such powers over children placed in its care by the courts' (p.12).

As Carney points out, the failure of the New South Wales government to give effect to the Children's Boards of Review, under Part VII of the *Children (Care and Protection) Act* 1987 (NSW), puts that State at odds with the requirement under Article 25 of the Convention on the Rights of the Child entitling children in state care to 'periodic review of the treatment ... provided and all other circumstances relevant to his or her placement'. Hopefully the new *Community Services Commissioner and the Community Services (Complaints, Appeals, and Monitoring) Act* 1993 (NSW) may go some way towards remedying these deficiencies. In general, however, the concern is that children tend not to complain, and that children's needs tend to get lost in the competition from other sectors. What is needed then is a Children's Commissioner or similar position which has 'the interest of the child, and no other interest, as the starting point, the focus and goal of its work' (Flekkoy 1991).

Another factor limiting accountability is that of the many roles fulfilled by the statutory welfare authority: as receiver of notifications, investigator, assessor, prosecutor and helper and, for children under state guardianship, guardian. Two main conflicts of interest are evident

here. The first is in the authority's dual helping and prosecuting roles; the second, in the demand for non-specialist, under-resourced workers to attend to urgent and continually incoming notifications of abuse and neglect rather than to monitor and review the needs of children already in care.

In South Australia, one solution was the appointment of independent professional child advocates to attend, as a statutory obligation, meetings at which critical decisions were to be made about a child either currently in or about to enter care. Their unrestricted access to case files enabled the advocates to gain a clear picture of how decisions had been made during the statutory agency's involvement with the child, and provided an important check and balance on the departmental role. This monitoring role has since been removed in South Australian legislation.

A further limitation comes in the form of the not unreasonable confidentiality requirements. The problem arising is that it can be very difficult to monitor the activities of child welfare agencies, and thus to assure the public that children's rights and interests are being properly protected. Child welfare agency records are highly confidential in order to protect the interests of all parties, and harsh penalties may be incurred if confidentiality is breached. Thus, access to files is rarely allowed by non-agency employees (even research can be problematic for this reason), and bureaucratic child welfare organisations have a tendency to close ranks and become defensive when questions are asked (Cashmore, Dolby & Brennan 1994). Furthermore, child protection case conferences or reviews of children in state care do not involve, as a statutory right, a professional advocate for the child, and children's courts are closed both to the public and to the press. These features effectively silence people who may be genuinely concerned about professional agency practice and decisions made by the children's courts.

The extreme confidentiality in child welfare systems, and the lack of external responsible scrutiny, are serious matters. Unlike the United States, Australian statutory welfare agencies have not, as yet, been the subject of litigation because of harmful decisions made by workers on

behalf of vulnerable children. This situation may change, however, as child advocacy gains currency and test cases are brought before the courts. Replacing family privacy and autonomy with agency privacy and autonomy does not serve children well.

A staff attorney at the National Centre for Youth Law in the United States sums up the issues succinctly:

> 'The public interest in the operation of child protective services agencies is significant, not only because a community has an interest in the well-being of its children but also because these agencies expend huge amounts of tax dollars. The privacy of those involved with the child welfare system and the identity of those who report child abuse must be protected, but greater press access need not compromise these interests. In fact, making more information about the workings of public child welfare systems available to investigative reporters, far from compromising the interests of abused and neglected children, may be an important way of promoting those interests.' (Grimm 1992)

Not all commentators see the media in such a benign light, however, and there are dangers in exposing the plight of vulnerable and abused children to vicarious media interest. Uviller (1980), for example, accuses the media of 'gross distortion' and of trivialising the problem by manipulating the 'public's hysteria and sentimental fantasies of dramatic rescue' (cited in Goddard & Carew 1993, p.269). As we have seen in the publicity associated with both under- and over-reporting in Australia, with few notable exceptions, the media has difficulty with the complex issues involved in the interplay between state, family and children. These are dilemmas that require further debate.

Conclusion

Perhaps the most palpable area of tension in the complex three-way relationship between the state, families and individual children is the issue of state intervention in relation to child protection. Despite the continuing difficulties, there are several ways forward. One lies in the development of preventive programs and strategies. As the National

Child Protection Council (1993) pointed out in its report on the Council's proposed national prevention strategy: 'Without action to stop abuse from occuring in the first place, the demand will not decrease and the numbers of children needing help will continue to challenge the community's capacity to respond effectively' (p.vii).

Early intervention and family support programs constitute an important part of any prevention strategy and need to be developed together with services that are 'universal, well-resourced and non-stigmatising' (Scott 1993b). Services for children and families also need to be well-coordinated across traditional professional and departmental lines. Child protection is not just an issue for child protection workers, but is the responsibility of health, mental health, educational and child care professionals, together with the whole community.

Effective prevention and intervention to protect children also requires an improved knowledge base. Research and data systems are needed to provide a better picture of the system's response to child abuse and neglect and its effect upon children and families. The US Advisory Board on Child Abuse and Neglect (1991) commented in its second report on the perilous state of the child protection system in that country: 'In general, child abuse and neglect is one of the most inadequately studied major problems, and the knowledge that does exist has rarely been systematically diffused and applied in practice' (p.xi).

What is needed is systematic research outlining the extent of the problem, and longitudinal research evaluating the effects of the various forms of intervention on children themselves. There is still little research that asks children and young people about their perceptions and experiences in the system.

Finally, a serious commitment to a child-oriented child protection system, consistent with a family-focused approach, is called for. Such a system would attend to children's needs and interests, and their experience of state intervention. It would also 'provide opportunities (including legal representation) for children to be heard in proceedings affecting them' and would 'respond flexibly to the diversity of children's cultural backgrounds and of the circumstances in which they find themselves' (US Advisory Board on Child Abuse and Neglect 1991, p.xxi).

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7
Kids, Cops, Lock Ups and the Convention on the Rights of the Child

Danny Sandor

This chapter focuses on young people who are alleged to have, or are merely suspected of having, committed a criminal offence. The three principal aims are: firstly, to illustrate what O'Connor (1994, p.76) has described as 'the gap between the actuality and the rhetoric' of rights in such circumstances; secondly, to signal where Australia fails to meet the expectations laid down in the United Nations Convention on the Rights of the Child (the Convention); and thirdly, to consider how state compliance with the rights to which young people are entitled can be improved. Particular effort has been taken to incorporate direct quotes from young people as a means of giving modest effect to their right to be heard in matters which affect them. This is an expectation contained in Article 12 of the Convention. Every effort has been made to verify the law as at April 1995.

Suspects' rights in context

The state grants its officials a wide range of coercive powers to deal with suspected offenders. This brings with it the responsibility to ensure that powers are exercised in ways that are lawful and fair, through legal and administrative controls. Within the federal framework of Australia, the responsibility for regulating the process of investigation and the management of personnel has traditionally been the responsibility of the States and Territories. Accordingly, the controls on police powers which ought to translate into procedural rights

for children and young people can differ, and do differ, in both form and content around Australia (Warner 1994).

These rights should, however, consistently enable treatment which accords with basic principles and values, such as the presumption of innocence and the premium placed on liberty. Rights must reflect a recognition that the vulnerability of children and young people entitles them to special protections and rights in interactions with authorities that are frightening and profoundly unequal. These interactions are operated by personnel who have a systemic advantage over young people. They are agents of the state with greater knowledge and familiarity of law and its processes than young people (Galanter 1974). Such a position makes possible the abuse of power and authority and invites insensitivity to the experiences of those who come into the process.

In the context of this chapter, rights claims mediate the tension between two social priorities: the protection of individuals from interference and coercion by the state; and the state's pursuit of effective law enforcement (Freckelton & Selby 1988). For claims of rights to be effective they must, at a minimum, be capable of being invoked as a shield against unlawful and unfair exercise of power. Rights must also be understood as giving rise to legitimate expectations; that adults in the employ of the state will know, facilitate and enable (certainly not conceal, obstruct or violate) the exercise of young people's claim to treatment in accordance with what is both lawful and fair.

Human rights conventions

International human rights instruments reflect an endorsement and concern for these values. Such resolutions are, however, necessarily a product of compromise in the international community – a lowest common denominator among nations with differing cultural contexts, resources for implementation, and ways of responding both to young people and law-breaking.

This is particularly true of the Convention on the Rights of the Child, a framework which was developed by a process of consensus. The Convention brings together, with a specific focus upon children and

young people, the civil, political, social, cultural and economic rights contained in a wide array of international instruments. For the purposes of this chapter, it will be necessary to take particular provisions in isolation but readers should keep in mind that young people who are suspected of having committed offences are young *people* first and foremost. For those under 18 years-of-age all provisions of the Convention apply.

Some Articles are, however, particularly apposite to the topic. Article 37 prohibits torture and cruel, inhuman or degrading treatment and creates a positive right to humane treatment and legal assistance. Young people must not be arbitrarily and unlawfully deprived of their liberty; arrest or detention must be a last resort, used for the shortest possible time. Article 40 establishes the obligation upon criminal justice systems to treat young people in a manner appropriate to their age and consistent with the promotion of a sense of self-worth and dignity. The Article reiterates fundamental procedural principles and safeguards such as the right to be presumed innocent and the right to have decisions reviewed.

The context for these rights is found in the general provisions of the Convention. For example, the Convention requires that these rights are respected without discrimination (Article 2) and that the actions of member nations have the best interests of the child as a primary consideration (Article 3). It is incumbent on member nations to undertake all appropriate measures to implement the Convention rights (Article 4) and to accord the child a right to be heard in 'all matters affecting the child' (Article 12).

Australia and the Convention on the Rights of the Child

On 17 December 1990, the Commonwealth Government ratified the Convention after extensive consultation with all States and Territories (see the acknowledgment in Australian and New Zealand Youth Ministers 1993, p.5). Ratification signifies that Australia adopts, as *minimum* standards, the expectations contained in the instrument, and that we will work towards harmonising local laws, policies and practices. Australia is required to submit a report to a United Nations monitoring committee on domestic compliance with the expectations

in the Convention. It must also submit to questioning by a United Nations committee regarding its breaches and the steps it plans to take towards remedying these breaches. The outcome of such examination is very important and potentially embarrassing for a country like Australia, which took a high profile in the drafting of the Convention.

Australia's first report was due by January 1993 and still has not been submitted. It is being prepared by the Commonwealth Government with great reliance upon information by the States and Territories, especially in the area of what is termed 'justice'. Some of the content of the official report may therefore differ from the points made in the discussion which follows, or that which is contained in the material submitted by recognised non-government agencies such as the National Children's and Youth Law Centre.

International instruments do not form part of domestic law, or give rise to enforceable legal rights or obligations unless their provisions are incorporated into legislation (see the discussions in cases such as *Young v. Registrar, Court of Appeal* (1993) 32 NSWLR 262 and *Murray v. Director Family Services, ACT* (1993) FLC 92–416). However, in a significant recent decision, the High Court of Australia has decided that there is an expectation that decision makers who exercise discretion must pay regard to the rights set out in the Convention and, in particular, treat the best interests of any child likely to be affected by their decision as a primary consideration (*Minister for Immigration, Local Government and Ethnic Affairs v. Ah Hin Teoh* (1995) 128 ALR 353. The High Court's decision is being challenged by the Federal Government, which is seeking to nullify the effect of the decision through legislation (Victorian Council for Civil Liberties 1995; Walker & Mathew 1995).

In this chapter, reference will primarily be made to the Convention but it should be noted that three other international instruments are highly relevant to the discussion which follows: the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice; the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty; and the 1966 International Covenant on Civil and Political Rights. (See Van Bueren (1993) for all international instruments on children.) The International Covenant is

particularly significant because Australia has agreed to a process whereby claims of infringement of a right under that Covenant can be referred for determination by an expert United Nations Committee (see Chinkin 1993). The Committee's decisions are not of binding legal force but, as illustrated by the case of Tasmanian laws which criminalise private male homosexual behaviour, the process of complaint to the Committee can have substantial domestic political effect. This is a critical function of international human rights law.

Rights in police custody

The focus below on young people in police custody is a recognition that they are especially vulnerable to violation of their rights in this context: 'It is during apprehension, interrogation and questioning that most violations of young people's rights occur. This is the most hidden aspect of the child's contact with the criminal justice system and the stage at which the child is most vulnerable' (O'Connor 1994, p.90).

The preamble to the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty also recognises young people's vulnerability. But that is not to say that significant concerns do not exist in relation to interactions between police and young people on the street and in public places (Alder & Sandor 1989; National Children's and Youth Law Centre 1994; O'Connor & Sweetapple 1988; White 1994; Youth Justice Coalition 1994). The style, manner and lawfulness with which young people's rights are respected on 'police turf' such as the station, represents (what may be called) an accentuation of the treatment they are prone to receive in public view. The following sections consider which rights are meant to be observed for young suspects, together with material on compliance from a range of sources.

Under arrest

Each jurisdiction has differing laws which govern interventions with suspected law-breakers. Where informal discretionary methods, such as cautioning and informal warning, are not used and police do not exercise a discretion to proceed by way of summons or Court Attendance Notice, an arrested suspect is taken into custody and is likely to

be subjected to questioning and investigation methods such as fingerprinting.

What is an arrest? It is the serious act of depriving a person of their liberty for the purpose of compelling his or her appearance to answer a criminal charge. In a criminal investigation young people are either with police because they are believed to have committed an offence and are under arrest, or because they have gone with the police 'voluntarily'. The common law does not permit detention for the purposes of questioning (*Williams* v. *R* (1986) 66 ALR 385). Although legislation has been making inroads into this protection, under no circumstances could the following be justifiable:

> 'Young people the NCYLC [National Children's and Youth Law Centre] has spoken to in Queensland and Northern Territory speak of being locked up for two hours in a police vehicle then released and being taken from the inner city and dropped without means of transport at some remote spot distant from the city or town. The frequency and consistency of these complaints convince the Centre that this is routine police practice in some areas.' (National Children's and Youth Law Centre 1994, pp.9–10) (See also Australian Law Reform Commission 1995, p.176)

The distinction between being under arrest and 'assisting police' is important because the rights of suspects and any obligations towards them imposed upon police generally do not extend to the 'volunteers' who are assisting. This is based on the assumption that the volunteer is free to leave the situation. While a suspect is 'free' to assist police in their investigations, he or she cannot *in theory* be compelled to do so.

In practice, the distinction ignores the power discrepancy in the policing process. It can be especially difficult to establish that any assistance young people give to police is 'voluntary' in a meaningful sense. One reason is that their right to liberty is easily violated by police coercion. Young people in Queensland described their interactions with the police in the following terms:

> 'In the mall, police say smartly "shouldn't you be going home now" and we say "you don't own us". If we say something smart they are going to arrest you.' (Youth Advocacy Centre 1993b, p.22)

> 'Point of contact with the police, they want you to go with them, you know you don't have to go – police harass you, so you can't ensure your rights are upheld.' (Youth Advocacy Centre 1993b, p.24)

> 'Even though I knew my rights, that I didn't have to go with the police officer, they still dragged me into the car and took off even though I said "No, are you arresting me for something?" and they said "No, come with me anyway," and I said "No, because you are not arresting me," but they still got me into the car and took off ...' (Youth Advocacy Centre 1993b, p.25).

Even if young people are not physically forced to go with police and are formally told they are under no compulsion, they may nonetheless feel, or be made to feel, compelled to go with police for questioning. Take the example of two Aboriginal boys aged 16 who were picked up on an Adelaide street by police at 4:30 in the morning. They were searched, kept separate from each other for many hours and driven in different cars to different locations before being taken to Port Adelaide Police Station where they were questioned. A majority of the Full Court of the Supreme Court of South Australia decided that being told 'you are not under arrest' was sufficient for the Court to treat them as having gone of their own accord (*R v. S and J* (1983) 32 SASR 174). In a dissenting judgment, Justice White considered that more was needed in the circumstances; that the young people needed to be positively told 'you are free to go':

> 'The continuing conduct of separating, searching, watching, guarding and driving here and there in different cars could only have given the contrary impression. The inference that they were free to not to comply with their requests, indeed were free to go, was not only improbable but highly improbable in the circumstances, in my view.'

Rates of arrest

Notwithstanding criteria in law and internal directions to constrain the use of arrest in favour of methods such as summons and cautioning,

the police practice in some jurisdictions has been to prefer remand in custody over other methods. This contravenes the Convention which requires detention under arrest to be a last resort for the shortest possible time (Article 37 (b)). Rule 17 of the 1990 United Nations Rules for the Protection of Juveniles Deprived of their Liberty states: 'Juveniles who are detained under arrest or awaiting trial ("untried") are presumed innocent and shall be treated as such. Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures.'

In some jurisdictions, the degree to which arrest has been utilised is patently excessive. For example in Queensland: '... the Police Services Annual Report (1989) indicated that out of "3,847 young people under ... 17 years-of-age who were charged by Queensland police during 1988–1989, only 6.55% (252) were summonsed to court" ' (Youth Advocacy Centre 1993a, p.31).

In Western Australia, 74 per cent of young people brought to court in 1989 had been subjected to arrest and this was 'largely because of the time and resource consuming nature of issuing and serving summonses' (Legislative Review Committee 1991, cited in Warner 1994, p.39). The best interests of young people are meant to be a primary consideration (Article 3), not subject to administrative convenience.

The nature of the direct interaction between police and young people is a strong influence on police decision-making. Alder et al.'s (1992) report of a survey of 90 police officers found the degree of cooperation (96 per cent) and the attitude shown by the young suspect (89 per cent) to be a crucial factor in the choice of how they proceeded. The effect of gender on arrest rates is an area where the research is limited and usually comes from overseas, where the results are mixed (Alder 1994). Evidence suggests that young women whose alleged offences flout conventional notions of femininity are more prone to arrest, for example where crimes of violence are alleged. A further factor in arrest seems to be the consistency of the suspect's demeanour with stereotypic gender expectations, for example, crying or claiming to have been led astray. Alder (1994) concludes that: '... a simple comparison of arrest rates for boys and girls to determine who is

treated more harshly may hide more than it reveals, both of the process and young women's experiences of them' (p.163).

In particular, comparisons between the experiences of girls and boys may conceal the use of arrest based on a misguided assumption that confinement will achieve 'safety' or 'protection' (Carrington 1993; Jaggs 1986). Such paternalistic considerations can also come into play with young people who are homeless (Human Rights and Equal Opportunity Commission 1989).

Discriminatory outcomes on the basis of race are evident in the effect of police decisions to divert from formal processing. This extends to the choice between arrest or less intrusive options. Cunneen's (1994) review highlights the much greater and faster penetration of Aboriginal young people into the most coercive processing options, particularly in New South Wales, Western Australia and South Australia. For example, in Western Australia, Aboriginal adults and children were about half as likely as non-Aboriginal people to be proceeded against by way of summons (Broadhurst et al., cited in Cunneen 1994). The analysis by Gale and Wundersitz (1989) of South Australian data from 1983–84 similarly found that arrest was used nearly twice as often in cases where the suspect was Aboriginal.

Sydney data from the Youth Justice Coalition (1994) points to comparable system biases for young people from other than English backgrounds: 'Of the young people describing themselves as Australian 17.8 per cent were arrested, compared with 64.7 per cent of those describing themselves from an Asian background, 33.3 per cent of Indigenous Australians and 50 per cent of those from a Pacific Island background' (p.6).

From this review of material about arrests, Australia cannot claim that it fulfils the requirement of Article 37 (b) of the Convention which mandates deprivation of liberty as a last resort. Nor can it be said that patterns of decision-making about arrest in Australia adhere to the requirement of non-discrimination among children and young people. This is found in the Convention and specifically in Rule 4 of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, a Resolution which expressly applies to young people under arrest (Section III). Rule 4 states:

> 'The Rules should be applied impartially, without discrimination of any kind as to race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability. The religious and cultural beliefs, practices and moral concepts of the juvenile should be respected.'

At the police station

The rights which are meant to be respected for young people who are taken into custody are at least equivalent to those for adults. The sources of the rights are spread across statutes, case law or administrative statements such as the New South Wales Police Commissioner's instruction (Aronson, Hunter & Weinberg, pp.324–33). This scattering of rights provisions engenders confusion and ambiguity, which serves the interests of neither police nor alleged offenders.

Save for recent changes introduced in a 1993 amending act (which are discussed later), the Victorian *Crimes Act* 1958 gives the appearance of the strongest protections (Lane 1989). It is therefore a useful vehicle for a discussion of the adequacy with which rights are formally expressed.

Suspects' rights are generally expressed as obligations upon police which must be effected before police engage in any questioning or investigation of a person in custody (Sandor 1991). The Act imposes an obligation to caution as to the suspect's right to silence, to afford communication with a friend or relative and a legal practitioner, and to have the use of an interpreter if needed, and states that the suspect must be told of these rights. There is an expectation that interviews relating to indictable offences will be tape-recorded.

These rights are, however, expressed as being subject to exceptions. For example, the investigator need not fulfil the obligation to allow a phone call if he or she believes on reasonable grounds that 'the communication involved would result in the escape of an accomplice or the fabrication or destruction of evidence'. Moreover, the positive obligations upon police conduct are not backed up by sanctions. The Act provides no penalty for breach.

In all Australian States and Territories, the legal consequence which flows from non-compliance is that the court has a discretion to

exclude evidence such as admissions or confessions that were acquired by improper, unfair or unlawful means (Palmer 1993), and some courts have done so in some children's cases (Warner 1994). Although one might have expected otherwise, there is no general rule that the court will exclude such evidence even if it is illegally obtained (*Cleland v. R* (1982) 151 CLR 1).

A few years ago, Justice Nathan of the Supreme Court of Victoria was alone in *R v. Shaw* (1991) 57 A. Crim R. 25 in considering that a breach of the Victorian statutory requirement to afford contact with a friend or relative and lawyer should effectively give rise to a presumption against admitting such evidence. The Full Court of the Supreme Court of Victoria subsequently disapproved of that view in *R v. Heaney* [1992] 2 VR 531 (but the issue is not closed, as can be seen in the later High Court decision of *Pollard v. R* (1992) 110 ALR 385 and its discussion in *R v. Percerep* [1993] 2 VR 109 at 118–20).

Some of the judgments in *Pollard* suggested a leaning towards the view of Justice Nathan, especially when the breach was deliberate or reckless. In that case, Justice Deane said 'such cases manifest "the real evil" at which the discretion to exclude unlawfully obtained evidence is directed ... In such cases, the principal considerations of public policy favouring exclusion are at their strongest and will ordinarily dictate that the judicial discretion be exercised to exclude the evidence' (p.405). Chief Justice Mason was of the view that 'something less than reckless disregard of statutory duty' would suffice to bring the exercise of discretion to exclude into play (p.389).

These were cases involving adults in relation to serious violent offences. The situation with children and young people under the Victorian law, especially where the offence is less serious, has not yet been considered either with respect to the general rights of suspects or a child's special right to have a parent, guardian or independent witness.

This presence requirement exists in some form in all States and Territories in addition to the rights stipulated for adults. It is a formal recognition that what constitutes fair investigation tactics for adults can amount to coercion when the person is young (this of course begs the question of whether such methods should be considered fair in the first place). Yet the requirement is often linked to the gravity of

penalty available for the offence. Thus, under Northern Territory law, a third person need not be present if the offence is not punishable by 12 months imprisonment.

In Victoria, a parent, guardian or independent person must be present during questioning or investigation and they must have the opportunity to talk privately with the young person beforehand. Even if obeyed to the letter, this requirement would not represent a direct reflection of the expectation set out in Rule 10.1 of the 1985 United Nations Standard Minimum Rules for the Administration of Juvenile Justice: 'Upon the *apprehension* of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter' (emphasis added).

Reviews of research findings indicate poor compliance with the requirement (Hancock 1993). The most recent work by Alder et al. (1992) was a study of 383 young people drawn from Victoria, Queensland, Tasmania and Western Australia. Half of the young people said they had been taken back to a police station. Of these, a mere 35 per cent of young people had a parent or independent person present during questioning at a police station despite this being an expectation in some form throughout Australia.

Young people in Victoria, who apparently have the strongest legal basis for protection in Australia, actually recorded the lowest percentage of any State in relation to being allowed to make a telephone call (14 per cent), and only 38 per cent of those Victorians aged under 17 years had a parent or independent person present (White & Alder 1993, in response to criticism from Barnes 1992). Alder et al. (1992) also found that young people in neither full-time work nor school were less likely than other young people in the sample to have an adult present during questioning. One reason would seem to be the lack of clarity about the stage of the process at which the third party must become involved.

> 'The courts have not been consistent in their interpretation of [such provisions]. There are some cases which indicate that the courts do not treat the holding of a preliminary interview as objectionable in itself, and which largely condone the police

> practice of obtaining an initial confession without a parent or substitute present and then requiring it to be repeated in the presence of a witness (Seymour 1988, pp.196–8). Other cases have explicitly condemned such practices (*T. v. Waye* (1983) 35 SASR 247, 250; Seymour 1988, pp.197–8).' (Warner 1994, p.35) (See also Australian Law Reform Commission 1995, p.175.)

Brewer and Swain's (1993) consultation with the youth sector also drew attention to two other subversions of the intended safeguard: Justices of the Peace being called in 'after the police interview simply to confirm the evidence after it's been given', and the lack of actual or perceived 'independence' among third parties organised by police:

> 'The police reminded the "independent" witness in front of the child that he was invited to the Sunday sausage sizzle that the police had organised.
>
> The police have got their own list of "independent" witnesses. They're usually white, Anglo-Saxon males with little understanding – old J.P.'s. There's a general view among the police that they're just there to see that there's no [physical] abuse. The police and the witnesses need proper training about their role and how it should be exercised.' (p.43)

One would hope that the High Court decision in *Pollard* is a particular deterrence to police obtaining evidence unlawfully. Such deterrence either hinges on professional standards of practice or on the likelihood of getting caught. But the question of excluding evidence only arises when a suspect contests the charges against her or him. While it is true that the majority of adult suspects plead guilty to charges, the rates of acquiescence are even greater for young people (Naffine 1993). This is just one important explanation as to why the Victorian results in Alder et al.'s (1992) study have not been matched by challenges over the law to higher courts. We have no data on the level of successful applications at first instance level in the Children's Court.

Fingerprinting

Restrictions on the fingerprinting of children vary widely across Australia. For example, in the Australian Capital Territory, a court

order must be obtained by police before fingerprinting any child, whereas in New South Wales and the Northern Territory, the requirement of a court order extends only to young people under the age of 14 years. Under South Australian law, a court order is required if the young person has not been charged. In Queensland and Western Australia, there are minimal limitations imposed by police instructions. In Tasmania there is no power to fingerprint before conviction. Under the Victorian law in force at the time of Alder et al.'s (1992) study, an order of the Children's Court was mandatory for police to fingerprint a person in custody aged under 17 years; the requirement could not be waived by the consent of a young person or their family (Warner 1994).

Despite these Australia-wide variations in the law, 45 to 63 per cent of Alder et al.'s (1992) sample had been fingerprinted when taken back to a police station. The rates of fingerprinting for those who had *not* been arrested ranged from 14 per cent to 30 per cent. The highest percentages in both these categories for Alder et al.'s sample were found among Victorian young people (63 per cent and 30 per cent respectively).

The analysis sparked criticism from Barnes (1992) because Alder et al.'s sample included those aged 17 years and over. In Victoria, a 17-year-old is legally treated as an adult despite the Convention deeming those under 18 years as a child for the purpose of special safeguards. White and Alder (1993) duly conducted a re-analysis of Victorian figures, counting only those under the age of 17 years. Even so, they reported that 54 per cent of such young people taken to a police station in that State were fingerprinted, and that 50 per cent of those taken to a police station but *not* arrested were nonetheless fingerprinted (White & Alder 1993).

Changes to the Victorian law in 1993 attracted a good deal of controversy (Sandor 1993a). The aspects which concern fingerprinting warrant particular attention in the light of Alder et al.'s (1992) and White and Alder's (1993) findings, particularly since there were unsubstantiated comments at the time from a Deputy Commissioner of Police that the law as it stood, with its requirement of court authorisation, was hampering police efficacy (*The Age*, 27 April 1993).

The changes to the law concerning young suspects' rights are also an illustration of the flagrant lack of concern for the Convention shown by State and Territory governments. The Victorian legislation represents yet a further example of legislation flouting the Convention by a government obliged to legislate consistently with Australia's human rights commitments. A prior illustration is the draconian Western Australian *Crime (Serious and Repeat Offenders) Act* 1992 (Harvey, Dolgopol & Castell-McGregor 1993). This law is discussed in the chapter by Rayner.

The Victorian *Crimes (Amendment) Act* 1993 replaced a scheme of powers and controls over police methods of investigation instituted in 1988. The legal framework prior to amendment arose from an expert committee chaired by the then Director of Public Prosecutions with representation from key system players such as Victoria Police, the Legal Aid Commission and Prosecutors for the Queen (Consultative Committee on Police Powers of Investigation 1987).

The expert committee was in agreement that the stigmatising effects of fingerprinting required that the procedure be limited to only those cases where the seriousness of the offence required it. There was a consensus that no child under the age of 12 years should be fingerprinted, but the committee was otherwise divided on what to recommend. The view which prevailed reflected an appreciation that:

> 'Informed consent in this area requires a significant degree of experience in the real world, which juveniles simply do not have. The argument that their parents may make such decisions for them, was not found to be satisfying by some members of the committee because it pre-supposes not only the presence of parents but that those parents will be willing to look after the interests of the child. It also presumes the parents will have sufficient understanding of the rights of the child to be capable of adequately balancing the child's interests against any detriment that might flow from the fingerprinting.' (Consultative Committee on Police Powers of Investigation 1987, p.96)

The 1993 amendments radically altered the position with respect to young suspects even though the Police Association (*The Age*,

16 November 1993) and the Victorian Attorney-General, Mrs Wade (Second Reading Speech) claimed otherwise, contending that the powers simply brought Victoria into line with the other States and Territories. For children aged between 10 and 14 years, police are now empowered to fingerprint where both the child and the parent or guardian give consent. Only where their consent is not given do the police need to seek an order from the Children's Court. In such an application, the law expressly excludes the child from the status of being a party to the proceedings and precludes the child from calling or cross-examining witnesses.

Under the new legislation, young people over the age of 14 years are effectively treated as adults and have no access to a court determination about the need to submit to fingerprinting. This is so even where police intend to use 'reasonable' force to obtain the prints. Where such force is used, the Act provides for the presence of the parent, guardian or independent person. The fingerprinting is to be video-taped, but only if practicable; otherwise the procedure is to be audio-taped.

The new measures were strongly criticised by a wide range of specialist, professional and community sector bodies (Sandor 1993a). The criticisms were aired in the media, public forums and to the Victorian Parliament's Scrutiny of Acts and Regulations Committee, a government controlled Committee which is required to report on whether proposed legislation trespasses on rights or freedoms through, for example, making these liberties dependent upon non-reviewable administrative decisions (*Parliamentary Committees Act* 1968 (Vic)).

The critics argued that to treat children over the age of 14 years as adults contravened the International Covenant on Civil and Political Rights and the Convention, both of which require special procedures for the young. The provisions of the Act preventing young people over the age of 14 years from accessing a court to determine whether fingerprinting is warranted, and abolishing younger children's party status in such proceedings, are antithetical to Article 12 of the Convention. This provision requires that children be heard 'in a manner consistent with the procedural rules of national law'. In addition, the International Commission of Jurists submitted that the law specifically infringed the right of children 'to examine or have examined adverse

witnesses' (Article 40 (2) (b) (iv) of the Convention). Of practical concern was the creation of purported safeguards such as video-taping when police indicated these were not widely available (Scrutiny of Acts and Regulations Committee 1993).

The Scrutiny of Acts and Regulations Committee found it necessary to alert the Parliament to many provisions in the Bill. In an unusual step, the Committee also drew the following conclusion: 'The Committee is persuaded that the provisions in the Bill which relate to children may constitute a breach of international obligations to which Australia is a party' (p.11). Two days after the release of the Committee's report the Victorian Attorney-General Mrs Wade was described as having '... dismissed much of the criticism as coming from the "self-appointed guardians of civil rights" and being politically inspired' (*The Age*, 24 November 1993, p.1).

Mrs Wade had previously claimed to have legal advice that the legislation was not in breach of the Convention (*The Age*, 19 November 1993). If the advice existed, it was not tabled before her fellow parliamentarians, nor made public. One would have thought this was incumbent upon an elected Chief Legal Officer for a State within a country that was bound by the Convention.

Planning is under way for an action under the First Optional Protocol over this and other portions of the *Crimes Amendment Act* 1993, similar to that which was undertaken in relation to the Tasmanian laws mentioned in the introduction of this chapter. Young people do not, however, carry the same electoral clout to precipitate Commonwealth intervention. Such an action is a necessary but time consuming and expensive resort if the options paper promised by the Commonwealth Government (*The Age*, 19 November 1993) in relation to the Victorian laws does not materialise. More than two years have already passed and no options paper has been made public.

Bail and waiting for it

An arrested person, young or not, must be brought before a justice or a court if police do not grant bail under their powers. The speed of this varies. Under the common law, the standard is 'as soon as practicable'; however, legislation can specify time limits. For example, in Tasmania

and Victoria, the young suspect must be taken before a court or a Justice within 24 hours.

In the meantime, young people can be held in police cells and mixed in with adults for reasons other than their best interests. In fact, when Australia ratified the Convention, it formally lodged a reservation that it is not bound by the requirement to segregate young people and adults. One significant reason is the structure of the Victorian law. In that State, a person is automatically part of the adult system at the age of 17 years and presumed liable to custody in adult facilities. A further rationale is that the geography and demography of Australia does not allow for complete fulfilment of this Convention expectation.

Thus *formally*, it is no breach of the terms of Australia's agreement to be bound by the Convention to find that laws requiring segregation are expressed in qualified terms. For example, under the South Australian *Young Offenders Act* 1993, geographical considerations permit a young person to be held in a police prison or an 'approved' police station, watch-house or lock-up. The officer in charge must take 'such steps as are reasonably practicable' to separate young people. The issue is admittedly double-edged; the removal of young people, especially young Aboriginal people, from their communities to distant metropolitan facilities would be a form of inhumane treatment in itself, and one which aggravates the risk of death in custody.

The conditions of watchhouse incarceration contravene numerous Articles of the Convention (Brewer & Swain 1993; Juvenile Justice Advisory Council 1993). Detention in police lock-ups is a stigmatising experience where young people are vulnerable to violence, especially from others in the cells. The lack of activity options fuels the potential for disruptive behaviour which triggers conflict between police and detainees. The Queensland Law Reform Commission described detention in such a site as 'one of the worst forms of incarceration': 'Watchhouse accommodation is unsuitable for the care of the young. Facilities are sub-standard. Further, young people who have had little or no contact with the criminal law may be corrupted by repeat offenders' (Youth Advocacy Centre 1993b, p.17).

Against such a backdrop, it is especially disturbing that some young people say that watchhouse detention is used as a tactic to frighten them:

> '... and he didn't hit, he just went slap over the back of my head, and it's a scare tactic as well, they try these scare tactics on you.'
> 'What other scare tactics?'
> 'Oh like as in "we might put you out the back with the Aboriginals (sic) so they can fuck him up the arse" and all this sort of stuff.' (Nat, cited in Alder & Sandor 1989, p.31)

The threat can have the opposite effect:

> 'To me it was a pretty scary experience. These guys, they were all talking about what they had done and to me it was pretty heavy. I was interested, fascinated by it, the different ways of doing all these things, how to steal, I thought it was great.' (Youth Advocacy Centre 1993a, p.34)

In general, laws governing bail are framed to give rise to a presumption that bail will be granted unless there are particular features to the case which indicate (to the police or the court) that bail should not be granted (Aronson, Hunter & Weinberg 1988, p.368). Factors such as the gravity and nature of the offence and the risk of interference with witnesses are weighed against the desirability of maintaining the freedom of persons who are still only suspects.

Bail laws generally apply the considerations developed for adults to young people (Juvenile Justice Advisory Council 1993). This is not in keeping with an expectation of the Convention that 'States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children' (Article 40 (3)). This provision does not justify the construction of additional hurdles to liberty while waiting for trial. One of the more insidious is the refusal of bail in the purported interests of a child's welfare or protection. It is obviously a dangerous fiat which 'can be used to justify the detention of any child' (Youth Advocacy Centre 1993a, p.16). In Victoria and Queensland this ground has been repealed, although there has been discussion of its reintroduction in Queensland.

A variation on this theme is now law in Western Australia. The *Criminal Procedure Amendment Act* 1994 has restricted the opportunities for young people's bail by no longer allowing for bail on their own undertaking; a 'responsible person' must now vouch for them. As

a result, Western Australia has increasing numbers of young people held on remand, a large proportion of whom are young Aborigines who are at significant risk of death in custody.

Bail laws do not in their words entitle the sex or cultural background of the suspect to make a difference to the decision-making, but an examination of outcomes suggests otherwise. Girls have long been more likely than boys to be locked up by the system for their own 'protection' (Carrington 1993; Jaggs 1986). Being an Aboriginal person makes you more vulnerable to refusal of bail (Braditke 1994; Gale, Bailey-Harris & Wundersitz 1990; Luke & Cunneen 1993). Young Aborigines are disproportionately subjected to the imposition of conditions such as unrealistic curfews or exile from the town where they live until the time of the court appearance (Juvenile Justice Advisory Council 1993, p.211). Measures which slice children away from kith and kin or set young people up to breach bail are oppressive of young people's rights. They are discriminatory and inconsistent with the requirement that the best interests of the child be a primary consideration in all decisions concerning the child.

Anecdotal material indicates that young people from other than English-speaking backgrounds suffer similar system bias to young Aborigines. At present the incidence of this bias is impossible to assess given the poor standard of data collection where loose descriptions such as 'Black' or 'Asian' are used. As a result of small scale project findings in both Sydney (Youth Justice Coalition 1994) and Melbourne (Wilkins & Yaman 1994), the Human Rights and Equal Opportunity Commission is urging the introduction of uniform data that allows comprehensive analyses of system intervention with children and young people from other than English-speaking backgrounds. This would enable comparisons with work which Cunneen and others have undertaken in relation to indigenous Australian young people.

What is most distressing about the known remand rates is the low correlation between remand and subsequent custodial outcome. In New South Wales, the *Kids in Justice Report* (Youth Justice Coalition 1990) cited a 1984 study by the relevant government department which found that:

> '17.5% of cases were refused bail by the courts, which was twice as high as the comparative adult bail refusal rates, and that 53% of males and 63% of females refused bail *were not* subsequently committed to a detention centre. Females were more likely than males to be refused bail, and those bail refused were three times as likely to be admonished and discharged [receive a non-custodial penalty] as males.' (p.281, emphasis added)

Five years later there was still an unacceptable overuse of remand.

> '61% of young people [who had] final bail refused *did not* incur a custodial sentence (FACS [Department of Family and Community Services Court] Information system, Jan–July 1989). These figures show that 40% of young people bail refused by police are finally allowed bail by the courts. In other words, for every 100 young people held in custody by police, only 60 are ordered to remain in custody by the courts and only 24 of those eventually receive a custodial sentence.' (p.281, emphasis added)

The picture in Victoria for boys aged 10 to 14 years and young women aged 10 to 16 years is also alarming. In the 1992–93 financial year, 219 young people in these age groups were remanded (Probation Officers and Volunteers in Corrections Inc. 1994). Only 11 of these, 5 per cent, received a custodial sentence at court. Yet in Victoria, 'Bail must not be refused to a child on the sole ground that the child does not have any, or any adequate accommodation' (Section 129 (7) *Children and Young Persons Act* 1989).

A number of factors are at play. Firstly, young people lack access to skilled legal advice when bail decisions are made outside normal business hours at the police station. Funded after hours legal advice services are scarce and shrinking, as illustrated in the Victorian Government's withdrawal of grant moneys used to coordinate the volunteer lawyers of 'Alphaline'. The data also make it hard to resist the conclusion that those responsible for deciding bail are not applying the existing law correctly. They may, however, think that they are. For example, the Victorian law, while an encouragement to redressing the higher chance of remand among homeless young people, left it open for accommodation to become an indirect rather than direct reason for

refusing bail. The Human Rights and Equal Opportunity Commission Report (1989), *Our Homeless Children*, foreshadowed this: 'In practice, however, children with no fixed address may continue to be remanded in custody because of perceptions that they are more likely to fail to appear [to answer the charge]' (p.261).

The advent of bail facilitation and accommodation programs in jurisdictions such as New South Wales and Victoria is a welcome initiative. These programs are at an early stage of development and require expansion. The programs have important limitations. Firstly, what is termed 'bail advocacy' in Victoria is not advocacy in the sense of argument based on a rights perspective; it is the provision of assistance to address concerns about bail, for example, accommodation or supervision arrangements, and the assistance is selectively offered on the basis of the worker's assessment. The distinction between young people's rights and needs is prone to be blurred. Secondly, the schemes often bring with them official involvement and conditions which risk net-widening; that is, the risk of young people who would otherwise have been bailed on their own undertaking, being drawn into the net of state control. The current concerns over unrealistic bail conditions, particularly for young Aboriginal people, are at risk of being repeated in program features such as 'eligibility assessments' or 'hostel rules'.

The infliction of harm

Alder et al.'s (1992) survey of 90 police in Queensland, Western Australia and Tasmania found that more than half the police responding agreed that 'too much force' was sometimes used in dealing with young people. This understates the situation disclosed by compliance studies using a variety of methodologies. Data obtained from interviews around Australia with young people (Alder & Sandor 1989; Alder et al. 1992; Cunneen 1991; Federation of Community Legal Centres (Vic.) 1991; Hirst 1989; O'Connor & Sweetapple 1988; Youth Justice Coalition 1994), reports from workers (White, Underwood & Omelczuk 1991), and a survey administered to lawyers (Alder et al. 1992) all indicate that young people are harmed beyond the denial of their procedural rights in the course of their encounters with police. They are subjected to threats, intimidation, verbal abuse and physical assault. Formal mechanisms of

redress are inadequate (Australian Law Reform Commission 1995; Standing Committee on Social Issues 1995).

The risk of physical harm appears greater for young men, young Aborigines and marginal young people (Alder et al. 1992). The vulnerability to abuse for young Aborigines found by Alder et al. is consistent with the findings of the Human Rights and Equal Opportunity Commission Inquiry into Racist Violence (Cunneen 1991). In that study, 171 young Aboriginal people from New South Wales, Western Australia and Queensland were interviewed for the Inquiry. Eighty-five per cent reported that they had been hit, punched or kicked by police officers, often with objects such as police batons. These assaults cannot be explained by the circumstances of arrest as they frequently occurred at the police station. White, Underwood and Omelczuk's (1991) Western Australian research used workers in youth services as the source of data. They found that those workers involved mainly with young Aborigines reported a 60 per cent higher incidence of complaints relating to police assault than workers who dealt predominantly with young people who were not Aborigines.

Findings in relation to homeless young people are also strikingly consistent. In a Melbourne study which was not designed specifically as a study of police violence towards young people, but rather a broad assessment of the sources of violence in lives of young people who are homeless, 58 per cent of young men and 47 per cent of young women reported having been physically hurt by police (Alder & Sandor 1989). Concurrent research for the Salvation Army found that:

> 'Over half the young people interviewed who have committed offences claim to have been physically abused by police officers. The alleged incidence is even higher among the under 16-year-olds, 67 per cent of whom claim to have been physically abused by police officers during questioning. The nature of the abuse ranges from general punching and slapping around to being hit over the head with the telephones, punched in the chest with telephone books to disguise the bruises, hit on the head with the butt of a gun, handcuffed and driven roughly for extended periods in police vans and burnt with cigarette butts.' (Hirst 1989, p.7)

Of course, not all young people say their experience was abusive. Just as young people's vulnerability to police violence differs, so too one cannot treat police as a homogeneous group. But one must also listen carefully when young people describe their treatment in what may seem to be positive terms. Some of the reasons why young people feel their treatment was good stem from factors such as their own lack of rights knowledge with which to measure treatment, and young people's abrogation of their rights:

> 'Children who confessed, who did not seek to exercise the right to remain silent or seek to call a lawyer and who voluntarily accompanied the police to the station received, from the child's point of view, good treatment. This treatment was only "good" in the context of the child's own expectations of normal treatment by police. None of those who received "good treatment" questioned the appropriateness of their arrest rather than summons, of being fingerprinted, photographed and processed through the watch-house.' (O'Connor 1994, p.85)

The evidence indicates that children and young people who fail these compliance tests are likely to have their rights violated:

> 'Yes, the police abide by the rules, if you are not co-operative then the police will bend the rules but if you are good with them then they (respect legal rights), always get someone for police questioning.' (Youth Advocacy Centre 1993b, p.20)

> 'Do you think you provoked them in any way?'
> 'Oh a little bit.'
> 'What did you do?'
> 'I sort of said, "I don't have to say anything to you mongrels", and they started pushing me around. The first copper who pushed me, I pushed him back and that made it worse, then three coppers were pushing me around.' (Austin, cited in Alder & Sandor 1989, p.32)

> Q: 'What about the police who arrested you?'
> Paul: 'They took us to the police station and they made a lot of interviews to us and at first we didn't tell the truth and they made us tell the truth.'

> Q: 'How did they do that?'
> Paul: 'They threatened us a bit, and I think that's what they do with everyone.'
> Q: 'What threats did they make?'
> Paul: 'Beat you up, and bash your head against a wall and that.'
> Q: 'And then did you confess, did you?'
> Paul: 'Yes …' (O'Connor & Sweetapple 1988, p.21)

> 'Have you ever been physically hurt by the police?'
> 'Well, when I got charged with that theft and that and because I kept denying it, my dad came down there and as the lady – y'know she told me to hold a phonebook against my stomach and as she was just about to hit me, me dad walked in the room and she stopped so, y'know, I was lucky.' (Cheryl, cited in Alder & Sandor 1989, p.33)

It is disturbing that a common research finding is an expectation of harm and that violations and abuses which fall short of this expectation are perceived as 'good' treatment:

> 'Why do you feel it was O.K. for them to clip you over the ear and do that with the telephone book?'
> 'Because basically I fucked up. I mean you just don't crime, crime is fucked …'
> 'Do you believe that being clipped over the ear or hit with a telephone book is a crime?'
> 'Is a crime? No. The police are there to do their job … if I deserve it, well I deserved it, I was just being smart, I wasn't being straight.' (Nat, cited in Alder & Sandor 1989, p.35)

> Q: 'What about the police who arrested you?'
> Luke: 'Oh, they were good.'
> Q: 'Did they say anything to you when they arrested you (for stealing … with three other boys)?'
> Luke: 'Oh, they said, told me to tell Dad what I'd done and they said, me that I took $2,000, and I was scared so I said I did which I didn't.'
> Q: 'The police told you that you'd taken $2000?'
> Luke: 'Yes.'

> Q: 'And you were so scared that you agreed, even though you hadn't done it.'
> Luke: 'Yeah.'
> Q: 'But you still reckon they were OK?'
> Luke: 'Yeah.'
> Q: 'Why do you reckon they were OK when they said to you that you did something that you didn't do?'
> Luke: 'Because I thought that the police yell at you and all that. They didn't.' (O'Connor & Sweetapple 1988, p.24)

Moreover, when young people do suffer violations, they are unlikely to take formal steps to complain to official sources such as the police or the ombudsman (Alder & Sandor 1989; Australian Law Reform Commission 1995, pp.177–8; Federation of Community Legal Centres (Vic.) 1991; Youth Advocacy Centre 1993b; Youth Justice Coalition 1994).

> 'I took up the complaint with a solicitor, then I laid off a bit, because the police will you know pick you up again.' (Youth Advocacy Centre 1993b, p.35)

> 'Who did you try to tell?'
> 'I said to my social worker about it and the social worker said she couldn't do nothing because there was four police against one kid ...' (Judy, cited in Alder & Sandor 1989, pp.46–7)

> '... you just take it and forget it.' (Ben, cited in Alder & Sandor 1989, pp.46–7)

Improving compliance

Australia cannot afford to ignore or resign itself to the rights abuses detailed above. Refusal to act in a way that observes and allows the exercise of the rights of young people who are suspected or alleged to have broken the criminal law is not justified empirically, morally or politically. Inaction in the face of the compelling evidence which has been collected is, effectively, an active refusal and an endorsement of rights abuse. Further debate over the precise extent of abuses or the veracity of recorded accounts from numerous sources is cruel

polemic. Those who engage in it serve a purpose of distraction, cover-up or indifference.

This chapter has reviewed the literature concerning the rights of young people who are merely suspected of having committed a criminal offence. Three central findings shine through. Firstly, the rights enshrined in the Convention are not consistently reflected in domestic law. Secondly, even where rights are formally present, compliance is far from adequate. Thirdly, some young people suffer violations, which can only be characterised as deliberate, by those who are in the employ of the state.

This concluding section suggests some responses to police treatment issues based on the material reviewed in this chapter. For a more comprehensive range of recommendations see volumes such as Juvenile Justice Advisory Council (1993), Youth Justice Coalition (1990) and the chapters in White and Alder (1994).

The discussion which follows is designed to serve as a point of departure for practitioners to consider their roles in regard to the rights of children and young people. At the levels of practice, programmatic and systemic response, there are substantial opportunities for those who work in the field to influence the future treatment of young people. This calls for actions directed to the redress and prevention of rights abuse.

Practice responses

Young people are entitled to expect that their complaints about treatment will be believed. Practitioners are responsible for honouring this. Young people, like others with claims of rights violations, have the right to be treated as *prima facie* truthful. This is precisely the message which has been promulgated to the wide range of professionals required under mandatory reporting laws to notify abuse. There are striking similarities to the impediments to young people's disclosure of both family violence and criminal justice personnel violations: a sense of personal fault, an expectation of disbelief, and lack of faith in the system. To treat young people who allege violations by system personnel as untruthful until proven otherwise, is reminiscent of the discrediting and discredited treatment of survivors of sexual assault. Until

recently, the law distinguished sexual offence cases on the basis that allegations of sexual assault 'are easy to make and hard to rebut' (Aronson, Hunter & Weinberg 1988, p.846).

Workers can convey their belief in young people by linking young people to specialist resources such as lawyers and health specialists. The effect of rights abuse upon young people should not be underestimated, especially when the abuse has involved violence. Practitioners who take on claims of abuse of rights must be sensitive to how the effect of treatment can differ for young men, young women, and people from differing racial and ethnic backgrounds. As with any traumatic incident, young people will need space and time to debrief and vent the emotions of injustice and anger which legitimately follow. The involvement of people who are significant to the young man or woman needs to be negotiated rather than assumed. So does the question of what action is to be taken. Fear of repercussions cannot be discounted and practitioners are rarely able to give assurances that such further harm will not occur, especially for young people whose circumstances give rise to frequent contact with police.

It is essential for practitioners to familiarise themselves with the rights claims which young people can legitimately make. Only then, can workers exercise their responsibility to assist young people and, where appropriate, their families, to assert these rights. Moreover, interactions with police are daunting for practitioners as well as young people, especially in stressful circumstances such as streetwork or attendance at police stations. Various handbooks provide an accessible source of ideas for good practice, such as the law handbooks published by Fitzroy Legal Service in Melbourne and the Redfern Legal Service in Sydney. A sense of clarity about the applicable provisions can enable workers to take a firm stance where necessary and to know what to expect in policing situations. However, it cannot be stressed enough that non-legal practitioners must not trespass into providing legal advice.

Practitioners who have acquired knowledge about rights and the law have an obligation to transmit this knowledge. It is incorrect to assume that rights knowledge is widely held by young people (O'Connor 1994). Even less well understood by young people is the way in which the style of asserting rights can affect their observance.

This is a delicate matter, given the fine line between young people abrogating their rights and their making a claim for the observance of rights in a manner which is proper in the circumstances. Another view, expressed by Hogg and Brown (1985), is that young people are very much aware of the negative consequences of rights assertions. While workers with young people ought to respect young people's decisions, doing so is no excuse for inaction at a programmatic or systems level.

Programmatic responses

In prevention, responses have much to do with local political action; strategies which practitioners are well-placed to facilitate, especially if they are part of peer networks with a specific concern about treatment issues. Communities of interest, however affiliated, can use outlets such as public forums and the media to campaign for changes to police methods of treating young people. Another example of a form of local action is in the neighbourhoods and towns where 'streetwatch' committees of parents and neighbours are a visible presence which monitor police conduct in relation to children and young people.

Individual actions can quickly gain force as they multiply. A salient example was the outcry over unjustified strip searching of young people in Victoria (*The Sunday Herald-Sun*, 16 November 1994). So too, is the momentum which was achieved by the campaign conducted by the parents of Joe Dethbridge, a Perth teenager whose assault by police at a police station was captured on video tape. The Dethbridge family had a major role in organising a rally of approximately 1000 people in which a series of resolutions was endorsed. These included that:

- Parliament establish an independent body to investigate complaints against the police;
- video surveillance cameras be set up at all police stations and lockups covering areas where members of the public are likely to be taken;
- the tapes from such cameras be under the control of an independent body such as the Ombudsman;
- Parliament enact legislation to ensure that:

(a) when a juvenile is interviewed by police an independent adult must be present;
(b) every person in police custody has an immediate right to make telephone calls to family friends and a lawyer;
(c) every person in police custody suffering from disease or injury has an immediate right to medical attention;
(d) police must proceed by summons instead of arrest unless exceptional circumstances exist;

- the Government fund the Legal Aid Commission to set up a 24-hour service for people in custody to seek legal advice. (White 1993, p.111)

It is unfortunate and inexplicable that record-keeping about mistreatment events is surprisingly rare among agencies involved with young people. Statutory protection and juvenile justice services should view such data as 'core requirements', as their clientele are clearly vulnerable to the infliction of harm. The collection of such information, which should protect the identity of the young person concerned, is more than a valuable basis for research (Federation of Community Legal Centres (Vic.) 1993). Where police management are prepared to look critically at young people's treatment, such data can also facilitate their casting a closer managerial eye over stations under their responsibility. The data become not the basis of individual complaints, but rather a method of performance monitoring. In addition to record-keeping by individuals and agencies, the lobbying of government bodies with a statutory responsibility for young offenders or young people in protective custody specifically, is an effective rights strategy.

Many writings emphasise the importance of training for police that aims to develop a respect for the rights of young people (Chan 1994; O'Connor 1994). Achieving a better 'understanding' of young people is not, however, a sufficient goal. Nor is education of police without an organisational strategy to employ the learning in practice and implement procedural changes. It is encouraging that practitioners outside of police organisations are invited to contribute to training programs. But one must be wary of becoming part of a public relations strategy which does not translate into tangible changes in police practice and

procedure (Chan 1994; James 1994). Practitioners' enthusiasm to use such windows of opportunity should not deter them from requiring the training to be part of a strategy where demonstrable outcomes can be expected, and will be evaluated in partnership with other community representatives 'on the ground'. Anything less is co-option.

Systemic responses

Practitioners often feel that making changes at the systemic or structural level is beyond their reach. One should not, however, underestimate the value of medium to longer term impacts of individual and collective action. Even those sceptical of the scope for societal change must manage their pessimism so that current rights are not further eroded by silence and apathy.

One of the most extreme examples of individual action in changing the 'system' occurs when a court case becomes a vehicle for the establishment of precedent, or a precipitant of legislative change. For example, from the case law reviewed in this chapter it might be predicted that a presumption against admitting evidence obtained unlawfully could be established by a case where police violated a young suspect's legal rights in the course of investigating a minor offence. Test cases are rare for a host of reasons including the financial resources consumed by such cases. But practitioners should be aware that test cases are within the range of activities undertaken by the National Children's and Youth Law Centre. The Centre urges practitioners to contact them to discuss potential actions.

Another mechanism for participating in large scale change is involvement in targeted campaigns. One recent example is the national project funded by the Australian Youth Foundation and based at the Youth Legal Service in Perth. The project consulted widely in the process of developing model legislation that sets standards for police powers in relation to young people (Blagg & Wilkie 1995). This work addresses the current unsatisfactory manner in which rights are inconsistently accorded around Australia and the problems for rights education which arise from the location of rights claims in too many sources even within one State or Territory. Once formulated, the Foundation is expected to lobby for the adoption of the model legislation.

The new model should dovetail into a second project whereby the National Children's and Youth Law Centre (1995) is developing a Charter of Rights for Children and Young People which builds on the Convention to create specific and legally enforceable rights. Practitioners can use the document produced by the Centre to be vocal and active in drawing attention to the proposals within their workplaces, professional bodies, representative organisations and unions, urging these groups to exert their influence in advocating for the changes. An important audience for such efforts is the Inquiry into Children and the Legal Process by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission. The joint Inquiry will release a first discussion paper early in 1996.

A far more commonplace contribution to structural and systemic change is participation in shaping the social construction of young people. This may take the form of countering instances of media misinformation about young people and crime (Littlemore 1994; Stockwell 1993; Tait 1994) through letters to the paper and talkback radio. It is not just a case of correcting inaccuracies. Often what is needed is a challenge to the one-dimensional portrayal of young people as potential or actual law-breakers. Absent too, is the elucidation of how these are the same young people who are the objects of grave concern in child abuse campaigns or discussions about suicide rates.

Articulating the link between young people's victimisation and crime is an important strategic manoeuvre (de Clifford 1995; Sandor 1993b; Standing Committee on Social Issues 1995). But to avoid the result being one of just sympathy and potential disempowerment, we must also connect the discourse around young people and crime to the state's failure to meet other basic obligations to young people such as freedom from discrimination, employment, housing, income security and health services and the right to be heard (Boss, Edwards & Pitman 1995; Brewer & Swain 1993; Harvey, Dolgopol & Castell-McGregor 1993; Polk 1993; White 1989).

Young people's lack of social, economic, cultural, political and civil rights marginalises them. It pushes them into a position of frequent exposure and contact with the state's justice system personnel. Under these conditions, a right becomes only a shield – a flimsy one at that –

which must be invoked to cope with the circumstances they must live under. This is as much a cause of the vulnerabilities to rights abuse detailed in this chapter as are features of the processing system and its personnel.

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8
Medical Procedures for Children

Loane Skene

Except in an emergency, medical procedures cannot be carried out without consent from the patient or from someone with lawful authority to consent on the patient's behalf. This chapter explains who is entitled to consent to medical procedures for children. It outlines a range of situations: treatment for babies and young children (when the consent of a parent or guardian is generally sufficient unless the treatment may not be in the child's best interests); treatment for older children who seek medical intervention without their parents' knowledge, such as teenage girls seeking contraceptives and abortions; and cases where an older child and the parents disagree about the proposed procedure. Finally, the chapter considers a number of procedures that are unlawful even if consent is given, unless they are authorised by a court. These include invasive procedures such as the sterilisation of intellectually handicapped girls and, in some cases, the withdrawal or withholding of treatment from critically-ill newborn infants.

A parent's right to decide about a child's medical treatment is almost absolute with a very young child and diminishes to a mere freedom to advise as the child grows older and matures. A child, conversely, starts by having no legal right to make medical decisions and gradually acquires greater autonomy or decision-making power until, on reaching the age of majority, the child alone has the legal authority to decide. While the age of majority is 18 years in all States and Territories of Australia, in New South Wales and South Australia a child's capacity to consent to medical treatment is regulated by statute, and children can consent to their own treatment once they are 14 and 16 years, respectively (Section 49 (2) *Minors (Property and*

202

Contracts) Act 1970 (NSW); Section 6 (1) *Consent to Medical and Dental Procedures Act* 1985 (SA)).

There is a period, however, when an older child who has not yet reached the age of majority is legally able to consent to at least some procedures without a parent's knowledge or consent, and may consent even if the parents object. What these procedures are, and how old the child must be in order to consent to them, is still not entirely clear in law and much depends on the circumstances of each case. In addition, there is some doubt about the extent to which a child who is mature enough to consent to treatment is also mature enough to refuse it. It appears clear that a court may override the child's refusal if there is a threat to the child's life or health; it is not clear, however, to what extent the parents can override a child's refusal.

Babies and young children

The parents of a baby or a young child are legally entitled to decide what medical treatment their child will or will not have, provided that they act in the child's best interests. This right is based on their guardianship of the child until that child reaches 18 years. Each parent of the child is a guardian and either may consent to or refuse medical treatment (Sections 60E (1), (2), 60F *Family Law Act* 1975 (Cwlth); *Secretary of Health and Department of Health and Community Services v. JWB and SMB* (1992) 175 CLR 257, 235 (*Marion's case*)).

Clause 61C (1) of the *Family Law Reform Bill (No.1)* 1995 carries a similar message, stating that each parent of a child under 18 years has parental responsibility for the child, even if the parents have separated or remarried, unless there is a court order to the contrary. A 'parenting order' made under Clause 61D of the same Bill could confer parental responsibility on a person other than a parent, but it would not take away parental responsibility from a parent unless this was stated in the order or was necessary to give effect to the order.

In the great majority of cases, the consent of either parent is sufficient authority for a doctor or other health professional to undertake on a child a clinically indicated medical procedure, from a routine examination to complex surgery. Parents are also entitled to refuse treatment that a doctor recommends, or to choose alternative

treatment. However, this entitlement is subject to court intervention if the parent's decision seems not to be in the child's best interests, as explained below.

Information to be given to parents

When parents are asked to consent to treatment for their child, they are entitled to be given sufficient information to make an informed choice about whether to agree to that treatment. This includes information about the child's condition and prognosis, the options for treatment and their advantages and disadvantages, and the doctor's recommendation. The parents should be told the nature, duration and purpose of the proposed intervention and how it will be conducted. In particular, the parents are entitled to know any 'material' risks of the procedure.

The type of risk that is material in a given case has been considered in a number of recent court cases in Australia involving adult patients, and the principles would seem to be the same when parents are asked to consent to treatment for their child. In each of these cases, the patients alleged that their doctor had been negligent in failing to disclose the risks of the proposed treatment before they agreed to it. The decisions of the judges in those cases, especially the judges of the High Court (which is the ultimate appellate court), now provide legal guidance on the information that must be given to patients about proposed medical procedures. This court-made law is supplemented by guidelines for medical practitioners published by the National Health and Medical Research Council (NHMRC 1993).

Put simply, a risk is *material* and so must be mentioned to a patient if:

> '... in the circumstances of the particular case, a reasonable [or ordinary] person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it.' (*Rogers v. Whitaker* (1992) 109 ALR 625, 634)

It is the doctor's responsibility to decide whether a risk is material in this sense and must therefore be mentioned. The doctor will need to

consider 'the nature of the matter to be disclosed; the nature of the treatment; the desire of the patient for information; the temperament and health of the patient; and the general surrounding circumstances' (*F v. R* (1983) 33 SASR 189, 192, quoted in *Rogers v. Whitaker*, 632).

The National Health and Medical Research guidelines (NHMRC 1993) reflect the law as stated by the High Court and give examples of information that should generally be given to patients. Paragraph 9, for example, states that: 'Doctors should normally discuss the following information with their patients:

- the possible or likely nature of the illness or disease;
- the proposed approach to investigation, diagnosis and treatment
  - what the proposed approach entails
  - the expected benefits
  - common side effects and material risks of any intervention
  - whether the intervention is conventional or experimental
  - who will undertake the intervention;
- other options for investigation, diagnosis and treatment;
- the degree of uncertainty of any diagnosis arrived at;
- the likely consequences of not choosing the proposed diagnostic procedure or treatment, or of not having any procedure or treatment at all;
- any significant long term physical, emotional, mental, social, sexual, or other outcome which may be associated with a proposed intervention;
- the time involved;
- the costs involved, including out of pocket costs.'

Paragraph 11 states that: 'The way the doctor gives information should help a patient understand the illness, management options, and the reasons for any intervention. It may sometimes be helpful to convey information in more than one session. The doctor should:

- communicate information and opinions in a form the patient should be able to understand;

- allow the patient sufficient time to make a decision. The patient should be encouraged to reflect on opinions, ask more questions, consult with the family, a friend or adviser. The patient should be assisted in seeking other medical opinion where this is requested;
- repeat key information to help the patient understand and remember it;
- give written information or use diagrams, where appropriate, in addition to talking to the patient;
- pay careful attention to the patient's responses to help identify what has or has not been understood;
- use a competent interpreter when the patient is not fluent in English.'

It follows from these general principles that doctors should discuss with parents any serious risks of a procedure that is proposed for their child, such as the risk of death, brain damage or paralysis, even if the risk is fairly remote, because an ordinary person in the child's position would want to know about such a risk when deciding about the procedure. Similarly, a less serious but common risk, like stiffness of a joint or infection, might also need to be mentioned if an ordinary person would be likely to be influenced by it.

There are many other factors that may also be relevant in deciding whether a risk is material. If a patient is critically ill, for example, and the proposed procedure appears to be clearly for the patient's benefit, the patient may be less influenced by potential risks and there may therefore be less need to mention them. Conversely, if a procedure is essentially cosmetic, or could easily be deferred while the patient considers more fully what it entails, then risks may more readily be found to be material and requiring mention. If patients ask questions, they are entitled to be told the truth.

Parents cannot consent to some procedures

There are some procedures to which parents cannot consent, even if the parents and the child's doctors believe that the proposed procedure is in the child's best interests. This is objectively assessed by appropriately qualified third parties (*Marion's* case, p.240); it is not

determined by what the parents believe to be the best outcome for the child. Parents, for example, 'do not have the right to have a child's foot cut off so that he or she could earn money begging, and it is clear that a parent has no right to take the life of a child' (*Marion's* case, p.240).

Non-therapeutic sterilisation

The primary example of a procedure to which parents are not legally entitled to consent is a non-therapeutic sterilisation of an intellectually handicapped girl in order to avoid pregnancy and problems associated with menstruation. The High Court of Australia stated clearly in *Marion's* case, and more recently in *P v. P* [1994] ALJR 449, that parental consent is not sufficient in such a case; approval must also be sought from the Family Court (the procedure is set out in Order 23B, Family Law Rules). The reasons for this requirement include the 'varying kinds and consequences of intellectual disability ... (most intellectually disabled people are borderline to mildly disabled) ... [the danger of] an underestimation of a person's ability; ... the irreversible and major surgery ... the significant risk of making the wrong decision ... and because the consequences of a wrong decision are particularly grave' (*Marion's* case, pp.238–9).

Marion was a 14-year-old intellectually handicapped girl whose parents applied to the Northern Territory Supreme Court for an order authorising the performance of a hysterectomy and ovariectomy on her, or a declaration that they could lawfully consent to those procedures. Marion was severely deaf, epileptic and had behavioural problems. She had started menstruating and was incapable of caring for herself physically. She could not understand the nature and implications of sexuality, pregnancy or motherhood. Her parents believed, on the basis of medical advice, that it was in her best interests to have a hysterectomy to prevent menstruation and pregnancy, and an ovariectomy to stabilise hormonal fluxes and control psychological and behavioural problems. The issue was whether Marion's parents could consent to these operations as they could to other medical procedures.

The Court held that they could not consent to such procedures and that non-therapeutic sterilisation required court approval. This means

that, if a child's parents are in favour of a sterilisation procedure and the court agrees, the court will declare that the procedure is in the child's best interests, and the parents may then authorise it. If, on the other hand, the parents are in favour but the court is not, the court will declare that the procedure is not in the child's best interests and that it may not be undertaken. If necessary, the court may grant an injunction preventing the procedure. Conversely, if the parents are opposed to a proposed sterilisation procedure but the court finds it to be in the child's best interests, the court could declare that to be the case and appoint someone else to consent. The ultimate outcome in *Marion's* case, was that she was sterilised on the basis that it was in the interests of her long-term welfare (*Re Marion (No.2)* (1994) FLC 92–448).

It should be emphasised that, in *Marion's* case, the majority judges of the High Court limited their decision to *non-therapeutic* sterilisation. This case was distinguished from 'sterilisation which is a by-product of surgery appropriately carried out to treat some malfunction or disease' (*Marion's* case, p.250). In the latter case, the parents could consent for their incompetent child as with any other treatment. However, the proposed sterilisation must be a last resort after all other options have been considered. If the court is not satisfied that the procedure is in the child's best interests, it will not be permitted, regardless of the parents' wishes. Thus, although the majority judges stated in *Marion's* case that 'the best interests of the child will ordinarily coincide with the wishes of the parents', that is not always so.

This latter point is illustrated by another case in which the Family Court in Brisbane refused to allow an intellectually disabled girl to be sterilised (*L and GM v. MM; The Director-General, Department of Family Services and Aboriginal and Islander Affairs* (1994) FLC 92–449 (*Sarah's* case)). Sarah was 17 years old, physically and intellectually disabled, and epileptic and unable to communicate. She lived in a disabled persons' ward in a country hospital and her parents were not involved in her daily care. Sarah's parents applied for a court declaration that it was in Sarah's best interests to remove her uterus and cervix (but not ovaries) to avoid pregnancy and menstrual pain and to assist in hygiene. However, the Court was not persuaded. Her teacher said that the 'extra effort [of assisting with menstruation] is

inconsequential' and it did not affect her care. Although 'all concerned ... evidence horror at the prospect of a pregnancy for Sarah', sterilisation would not prevent sexual abuse; indeed the risk might be increased if it was known that she could not conceive. Further, the parents' argument that Sarah would be likely to receive better care if she was easier to care for, was not supported by the evidence.

Withdrawal of medical treatment

Another situation in which a parent's decision may not be sufficient authority for a doctor is the withdrawal of treatment from a critically-ill or severely disabled child, or the non-administration of life-sustaining measures. With adult patients, doctors are protected from criminal and civil liability if the patient, being competent and fully informed, directs that treatment should not be given, or should be withdrawn. However, this is not the case where the patient is a child and the only effective protection for a doctor who withholds or withdraws treatment may be a court order.

The extent of a parent's authority to make medical decisions for a critically-ill newborn infant is problematic. The Victorian Deputy-Coroner said during her findings in the Baby M inquest (1991, Record of Investigation into Death, Case No.3149/89), that the accepted Australian standard is for decisions relating to the management of children with gross congenital malformations to be taken by parents and physicians together. However, that statement would seem to be too broad, and is inconsistent with principles stated in other cases.

Baby M had been born with a very severe form of spina bifida. She had a brain abnormality, hydrocephalus and dislocated hips and knees, with her hips held in a constant position over her chest. The doctors believed that regardless of the treatment she might be given, there was a grave risk the child would not survive. If she did survive, her quality of life was likely to be so poor that one might question whether she would want to live such a life. Given this prognosis, her doctors, in consultation with the parents and their Roman Catholic spiritual advisers, decided that she should be given 'conservative treatment' – an open cot, food by mouth on demand, and pain-killers and sedatives to alleviate pain and distress.

Members of the Right to Life Association heard of the baby's condition from a relative who said that the baby was being sedated and might starve, and called the police. Police officers and independent medical specialists who examined the baby were satisfied that her care was appropriate. Baby M died after 12 days and an inquest was conducted. The Coroner's decision ultimately vindicated the parents, the doctors and the hospital and roundly criticised the actions of the Right to Life Association. It does not, however, bind courts or another coroner who is faced with a similar case. While compassionate and just, the decision seems at odds with a number of the recent decisions of the English Court of Appeal regarding appropriate treatment for a severely handicapped baby, which have generally ordered that the child be treated. In the absence of any binding law in Australia, such decisions would generally be followed by Australian courts.

In *Re B (a minor) (wardship: medical treatment)* (1981) [1990] 3 All ER 927, for example, the English Court of Appeal authorised treatment to remove an intestinal blockage in a Down's syndrome baby, because the prognosis was uncertain and the prospect of 'the child living for 20 or 30 years as a mongoloid' was not so 'demonstrably awful' that the relatively simple operation should not be performed to save her life.

In *Re C (a minor) (wardship: medical treatment)* [1989] 2 All ER 782, however, the English Court of Appeal was prepared to accept the advice of the specialist paediatrician who examined the severely handicapped infant, as to the best treatment for the baby's distress. 'C' was born with severe, irreparable brain damage (in addition to severe hydrocephalus, the brain structure itself was poorly formed). She was paralysed in arms and legs, blind, deaf, unresponsive to her environment and terminally ill. She was given shunt surgery for hydrocephalus to prevent her head becoming so enlarged that nursing would become impossible, but there was no prospect of it improving her overall health. The Court accepted that the goal of treatment should be to 'ease the suffering of C rather than to achieve a short prolongation of her life'.

In a later case, *Re J (a minor) (wardship: medical treatment)* [1990] All ER 930, the English Court of Appeal again considered the child's likely quality of life in deciding whether a severely handicapped child should

be treated. In this case, the prognosis was clear from the child's medical condition at the time. The baby had severe and permanent brain damage due to a shortage of oxygen and impaired blood supply during birth. He was epileptic and likely to develop serious spastic quadriplegia (paralysis of both arms and legs), to be blind and deaf, and to be unlikely to learn to speak or to develop even limited intellectual abilities. His life expectancy was at most into the late teens, and the proposed medical procedure (reventilation) was itself painful. The three judges in the case unanimously decided that it was in the child's best interests to withhold ventilation if he stopped breathing. It should be emphasised, however, that the Court did not authorise the withdrawal of life support treatment; it ruled that if the baby stopped breathing, he need not be resuscitated. The reasoning in the cases of *Re B*, *Re C*, and *Re J* was approved by the House of Lords in *Airedale National Health Service Trust v. Bland* [1993] 1 All ER 821 (*Bland's* case).

It seems, therefore, that parents are not legally entitled to consent to the withdrawal or withholding of life-sustaining treatment from a congenitally disabled or critically-ill child. There are, however, decisions that they may take for a dying child with the support of medical advisers. The administration of increasing doses of sedatives and painkillers to relieve pain, for example, is lawful so long as its purpose is to relieve pain and not to cause or accelerate death. Parents would normally be involved in making such a decision, and some hospitals try to spare the parents the full responsibility of the final decision by making it a joint one between doctors and parents.

Participation of children in medical research

The reason why parents alone cannot legally consent to procedures such as non-therapeutic sterilisation or the withdrawal of treatment from a severely disabled newborn infant, is that these procedures may not be in the child's best interests, and parental authority extends only to procedures that are for the child's benefit. This raises a problem in relation to the involvement of children in medical research, where the purpose is not to treat the child but to gain information about a particular medical condition, the effectiveness of a new drug and the like. If there is no benefit to the child (as there might be in a thera-

peutic drug trial), it would seem, on general principles, that the parents would not be entitled to consent to the child participating even if there was no significant risk. This would, however, prevent much useful research from being undertaken that might be of benefit to the community as a whole.

The National Health and Medical Research Council has published guidelines on research on children (NHMRC 1987). These state that 'scientific research is essential to advance knowledge of all aspects of childhood diseases' and that, while 'some programs may offer direct benefit to the individual child, ... others may have a broad community purpose'. Ethics committees are instructed to take special care in 'protecting the rights and welfare of children involved in research procedures' and in 'determining the acceptability of the risk/benefit relationship of any research study conducted'. In the case of therapeutic research (where the procedure may be of some benefit to the child), 'it is essential to weigh the risk of the proposed research against customary therapeutic measures and the natural hazards of the disease or condition'. In the case of non-therapeutic research, 'the risk to the child should be so minimal as to be little more than the risks run in everyday life'. Risks in this context include 'the risk of causing physical disturbance, discomfort, anxiety, pain or psychological disturbance to the child or the parents rather than the risk of serious harm, which would be unacceptable'. Consent must be obtained from the parents or guardian in all but exceptional cases (such as emergencies), and also from the child 'where he or she is of sufficient maturity and intelligence to make this practicable'.

By acknowledging that children may be involved in research that is not for their direct benefit, these guidelines seem to be inconsistent with general legal principles. However, if the risk to the child is minimal and the potential benefit of the research is significant, it would appear ethically acceptable for the child to be involved and it is unlikely that the law would prevent it.

Child's 'best interests': limits on parental authority

It is apparent from the sorts of cases mentioned above that, although parents are generally able to consent to treatment for their child,

parental authority is not absolute. Parents are required to act in the child's best interests and, if there is any doubt about whether a parent's decision accords with this, then any person who is concerned about the child's welfare or treatment may apply to a court to intervene. The state acts as the protector of children in the interests of society. This is called the *parens patriae* jurisdiction of the court and springs from the direct responsibility of the Crown to look after those who are unable to care for themselves.

The Family Court has a broad jurisdiction over the welfare of children, whereas the Supreme Courts have wardship jurisdiction, both at common law and under child welfare legislation. If a parent or guardian appears to be not acting in a child's best interests, the state may direct that treatment be given. This may be done by making the child a Ward of the State or by placing the child under the care of a state department of Health and Community Services. The Director-General of the Department then acts in place of the parents and exercises similar rights and responsibilities, which include the right to consent to surgical operations or anaesthesia. The State Supreme Court need not, however, make the child a ward before, or as a consequence of, exercising its *parens patriae* jurisdiction (Seymour 1992).

An order to require the provision of medical treatment for a child may be made by a State Supreme Court in its wardship jurisdiction, or by the Family Court of Australia in its welfare jurisdiction. In some States and Territories, guardianship boards may authorise treatment or appoint a guardian to authorise treatment. Even in Victoria, where the guardianship legislation does not apply to people under the age of 18 years, the Public Advocate has power to 'make representations on behalf of or act for a person with a disability', including people in an institution. These powers include acting for children (Section 16 (1) (e), (f) *Guardianship and Administration Board Act* 1986 (Vic)) both as a class and individually. Thus, in a case where parents refused to consent to surgery for their 11-year-old son who suffered from a congenital heart abnormality (the main blood vessels to the heart were transposed), the Public Advocate was entitled to apply to a court on the child's behalf and to be appointed guardian for the purpose of consenting to the operation (*Re Michael* (1994) FLC 92–471).

Unlike most cases, the court's jurisdiction in these situations is not strictly adversarial and anyone can apply to a court on behalf of a child where the child's wellbeing is at question. Thus, even if an applicant lacks standing to appear before the court (for example, because the person is not directly involved and has no official position authorising them to intervene), the court may still proceed to consider the case and to make an appropriate order if that is in the best interests of the child (as in *Re Michael*).

Lawful treatment without parental consent

If an emergency arises and there is an imminent risk of death or serious injury to a child, doctors may do whatever they consider to be necessary to avert that risk without seeking consent from anyone. This is the same principle that applies to emergency treatment for adults. Further, all States and Territories have legislation that authorises doctors to give children blood transfusions, even if the parents object, where the procedure is necessary to save the child's life. Section 24 of the *Human Tissue Act* 1982 (Vic), for example, states that parents are deemed to have consented to a blood transfusion if a doctor believed that it was 'a reasonable and proper treatment for the condition from which the child was suffering; and that without a blood transfusion the child was likely to die'. The doctor's opinion must be supported by a second medical opinion.

In New South Wales, the grounds for giving a blood transfusion are wider, including not only cases where there is a threat to the child's life, but also where a transfusion is needed to prevent serious damage to the child's health (Section 20A *Children (Care and Protection) Act* 1987 (NSW)). The authority to treat is not limited to blood transfusions but extends to medical and dental treatment generally. It is for the doctor to decide whether the treatment is necessary to save the child's life or to prevent serious damage to the child's health, and the test is not one of absolute necessity; the fact that the medical practitioner knows that without the treatment there is a small chance the child will survive and escape serious harm, does not mean that it is not necessary treatment for the purposes of the Section (*Birkett v. Director General of Family and Community Services*, Supreme Court of New South Wales, 12–13 August 1993, No.3161 of 1991).

Where a proposed blood transfusion or other medical treatment falls within the legislative provisions, it can be done directly. It is not necessary to apply for a court order, as it was before legislation such as that in New South Wales and Victoria was enacted. However, in some cases, court applications are still made. These cases include those in which the risk falls short of threatening the child's life, or the risk to the child's health is appreciable without being serious. Also, even in a case where the doctor may lawfully treat a child against the parents' wishes, the doctor may choose to obtain a court order in order to preserve the doctor–patient relationship. In cases not covered by legislation, the court will make an order for the child to be made a Ward of Court, or appoint someone to consent to the treatment if that is considered to be in the best interests of the child (*Dalton v. Skuthorpe*, Supreme Court of New South Wales, 17 November 1989; *Marchant v. Finney*, Supreme Court of New South Wales, 31 July 1992, No. 3599 of 1992).

A child who needs immediate treatment for mental illness could be detained and treated as an involuntary patient under mental health legislation in the same way as an adult. In Victoria, for example, the five criteria for detention (which must all be satisfied) are: that the person appears to be mentally ill; that the illness requires immediate treatment or care and that treatment or care can be obtained by admission to and detention in a psychiatric in-patient service; that the person should be admitted and detained for that person's health or safety or to protect members of the public; that the person has refused or is unable to consent to the necessary treatment or care for the mental illness; and that the person cannot receive adequate care for the mental illness in a manner less restrictive of that person's freedom of decision and action (Section 8 (1) *Mental Health Act* 1986 (Vic)). The procedure is initiated by a Request form signed by any adult over 18 years, which may include a relative, and a Recommendation form by a medical practitioner following examination of the person.

Parents not married, not available or disagree

If a child's parents are not married to each other, they still generally have the same rights of guardianship as married people unless those rights have been removed by a court. This means that either parent

can consent to treatment or refuse it, provided that they are acting in the child's best interests. If a child's parents, or one or more guardians, disagree about whether the child should undertake any proposed procedure, the doctor should, if possible, defer the treatment until the doctor or guardian can approach a court for guidance. If the case is life-threatening, or the failure to operate would seriously affect the health and wellbeing of the child, treatment could be given in the absence of a court order under the Emergency Doctrine, or on the basis of consent from the consenting parent or guardian.

Parents separated

If a child's parents are separated, the consent of the custodial parent or the parent with whom the child is living at the time will generally be sufficient authority, although it is possible that the custodial parent may be required by the custody order to seek the consent of, or to notify, the other parent of procedures affecting the child (either before treatment or afterwards). Generally, however, health professionals would not be expected to inquire into or to check such details unless the proposed treatment was serious or contentious.

Step-parents

If a child's parents have remarried, the child will have step-parents who may also be entitled to decide, or to participate in deciding, about the child's treatment. However, health professionals may not generally assume that a step-parent is legally entitled to agree to treatment, and if treatment is serious or contentious, the consent of both parents should be sought.

Child not living with parents

Even if a child is not living with his or her parents, the parents are still legally entitled to decide about the child's treatment unless their rights have been removed by a court order. For example, parents can decide about treatment for an intellectually disabled child who is living in residential care, although the carers could also consent to treatment, particularly if the treatment was minor or routine.

Guardian other than parent

If a child has a guardian other than the parents, the guardian has the same rights as a parent in consenting to, or refusing, treatment. Similarly, if a child is in the temporary care of someone else with the parents' authority, such as a babysitter or school teacher, that person could also consent to treatment in the same way as the parents if the treatment was needed immediately or was minor, such as first aid treatment. However, in more serious cases requiring medical intervention, the attending doctor should wait until the child's parents can be contacted or obtain a court authority to treat the child unless immediate treatment is required.

Guardianship legislation

Some States and Territories have guardianship legislation, which enables a guardian to be appointed to make decisions for people who cannot decide for themselves because of a disability. In Victoria, that legislation applies only to people over the age of 18 years, but in New South Wales and South Australia, it applies to people over the age of 16 years. In those States and Territories where the guardianship legislation covers people who are legally minors (over 16 but under 18 years), the provisions of the *Family Law Act* prevail if they are inconsistent with the State or Territory legislation.

This may be important in situations where parents want to have a daughter sterilised. Section 35 (1) of the *Guardianship Act* 1987 (NSW) provides that treatment involving sterilisation can be carried out only for the purpose of saving a patient's life or preventing serious damage to the patient's health. Part VII of the *Family Law Act* 1975, on the other hand, permits the Family Court to authorise medical treatment, including sterilisation, where it is necessary and in the patient's best interests. The High Court of Australia recently held that, in such a case, the *Family Law Act*, which is a federal statute, prevails over the State or Territory act to the extent that they are inconsistent with it, so that the test for determining whether a sterilisation procedure should be undertaken is that it is in the 'best interests of the child' (*P v. P*).

Intervention by other interested adults

Any adult person who is concerned about the welfare of a child, or the treatment or lack of treatment of a child, may apply to a court under its *parens patriae* jurisdiction (or, in some States and Territories, a guardianship board) to make an order concerning treatment, or to appoint a guardian to make decisions about the child's care or treatment. The person who applies may be a guardian, custodian, access person, person with whom the child lives, relative, doctor or nurse, or just a concerned individual. The approach may be made directly to the Court or, alternatively, to a government department or official.

Child abuse

All States and Territories but Western Australia have legislation under child welfare acts or their equivalent (except Queensland, where it is under Section 76K of the *Health Act* 1937) requiring people such as health professionals and teachers to notify a government department if they believe that a child has been abused. Such children may be detained for observation, assessment and treatment without parental consent if there is a reasonable suspicion that one or both parents may have abused the child or the child has been the subject of an offence. The legislation also protects people who report suspected child abuse from any legal repercussions.

Older children: who consents?

As noted earlier, a parent's right to decide about medical procedures for a child ceases when the child reaches the age of majority. After that age, children are legally entitled to make their own decisions and parents have no legal authority to countermand them. However, as children grow up, they gradually acquire the right to make their own decisions about at least some procedures and, when that happens, the child's consent is generally sufficient authority for the procedure to be undertaken. In such cases it is not necessary to contact the child's parents and the child is entitled to the same confidentiality of medical information as an adult patient.

Child consents, parents not involved

There are a number of reasons why there has been increasing judicial, and in New South Wales and South Australia legislative, recognition of the right of older children to make their own medical decisions. Children are becoming physically mature earlier than in the past and have increasing financial independence. As a result, they are seeking to make their own medical decisions, just as they make decisions in other areas of their lives. Children's rights have also been recognised as part of the general human rights movement, especially with the development of the United Nations Convention on the Rights of the Child (the Convention) which Australia ratified in 1990 but has not implemented by legislation.

Many of the Articles of the Convention are relevant to medical procedures for children, such as the principle that: 'In all actions concerning children ... the best interests of the child shall be a primary consideration' (Article 3 (1)); the requirement that the child's views, where the child is capable of forming them, must be taken into account (Article 12); and the acknowledgment of the right of a mentally or physically disabled child to 'enjoy a full and decent life in conditions that ensure dignity, promote self-reliance, and facilitate the child's active participation in the community' (Article 23 (1)).

Another reason for allowing children to make their own medical decisions is a concern that they may be deprived of necessary or desirable treatment if parental consent is required and their parents withhold that consent. However, although doctors may proceed without consent in an emergency, or if a court order is obtained, there are conditions for which children may not seek treatment if they cannot do so without their parents' knowledge. Such disorders include, for example, eating disorders and sexually transmitted diseases.

Simple and more serious procedures

The age at which a child is sufficiently mature to consent independently to treatment depends not only on the age and maturity of the child, but also on the type of procedure in question. A relatively young child, for example, even a child of only seven or eight years, could consent to simple, non-invasive procedures, such as examination of a sore throat.

The rationale for this could be that the child's parents have given an implied consent for appropriate procedures by making the appointment for the child to attend; but equally, it could be that the child is able to understand the nature and purpose of the procedure.

If the procedure is more serious than a simple examination or the like, the child must be older before being able to consent, but there are few clear rules. In New South Wales and South Australia, children of 14 and 16 years respectively have a statutory right to consent to their own treatment (Section 49 (2) *Minors (Property and Contracts) Act* 1970 (NSW); Section 6 (1) *Consent to Medical and Dental Procedures Act* 1985 (SA)). In other States and Territories, children in this age bracket have a common law right to consent to most types of treatment. Also, throughout Australia, children younger than 16 or even 14 years can consent to many procedures if they are considered to be sufficiently mature. This right was recognised by the majority judges of the High Court in *Marion's* case, when they approved the following statement of Lord Scarman, in a case heard by the House of Lords in England: 'A minor is ... capable of giving informed consent when he or she "achieves a sufficient understanding and intelligence to enable him or her to understand fully what is proposed" ' (*Gillick v. West Norfolk AHA* [1986] AC 112, 189, quoted in *Marion's* case, p.237).

In *Gillick v. West Norfolk* (*Gillick* case), this principle was the basis for the House of Lords' decision that a girl under the age of 16 years (the statutory age for consenting to medical treatment in England) was legally entitled to be given contraceptive advice without her parents' knowledge or consent if she was sufficiently mature to 'understand fully what is proposed'. In *Marion's* case, the majority judges said that, 'This approach, though lacking the certainty of a fixed age rule, accords with experience and psychology', referring to the psychological model developed by Piaget which suggested that 'the capacity to make an intelligent choice, involving the ability to consider different options and consequences, generally appears in a child somewhere between the ages of eleven and fourteen' though it might be even earlier (*Marion's* case, pp.237–8).

The capacity of children below the age of 18 years to consent to medical procedures independently of their parents is recognised by the Medicare

system. If a patient is over 14 years, the doctor may bulk-bill Medicare for the consultation, with or without advising the child's parents. A separate Medicare card may be issued to a patient over 15 years.

Before acting on the consent of a child, however, a doctor must be satisfied that the child has 'sufficient understanding and intelligence to understand fully what is proposed'. This requires an assessment of the child's general maturity and level of understanding. If a child is socially independent of the parents, living alone and self-supporting, it is more likely that the child will be legally entitled to consent. The doctor would then be obliged not to inform the child's parents about the child's condition or the procedures undertaken. The more serious or invasive the procedure, the more carefully the doctor should assess the child's level of understanding.

Some writers have commented that doctors are more likely to assess as competent a child who agrees with the doctor's recommendation. Priscilla Alderson (1990) suggests that: 'when children arrive at the same decision as adults, wise maturity may look like compliance or dependence. Conversely, children's dissent may be seen as immature folly' (p.100). Professor David Lanham has remarked that: 'There is a wide gulf between the capacity to accept life-saving treatment and the capacity to refuse it.' He continues by arguing that 'the decision of a young child to refuse treatment which prolongs a painful and incurable condition should be regarded as a competent one' (Lanham 1993, p.106), but this matter has not been considered by an Australian court.

It may be noted that in the *Gillick* case, one judge said that a minor must not only understand the proposed procedure to make it lawful for the doctor to act on the consent alone, but the procedure must also be in her best interests (*Gillick v. West Norfolk*, p.174, Lord Fraser); this appears to mean her general welfare, rather than her medical interests. Such a requirement would obviously limit the capacity of a mature minor to make her own decisions, and it is doubtful that it represents the law in most Australian jurisdictions. The South Australian legislation, however, does include a requirement that a minor must not only understand the procedure in order to consent to it, but that it must also be in the minor's 'best interests' (Section 6 (2) (b) *Consent for Medical & Dental Procedures Act* 1965 (SA)).

In any event, courts are likely to take a rigorous view when assessing the competence of a minor who refuses treatment recommended by a doctor. In *Re E (a minor)* [1993] 1 FLR 386, an English judge ordered that a 15-year-old leukemia patient, who was a Jehovah's Witness, should be given a blood transfusion despite his refusal (and the refusal of his parents). The judge ruled that although the child was 'obviously of sufficient intelligence to be capable of making decisions about his wellbeing, there are still a range of decisions the full implications of which ... [he] was still insufficiently mature to grasp'. Thus, although the child said 'he would refuse well knowing he may die as a result, he [did] not have any sufficient comprehension of the pain he [had] yet to suffer, of the fear that he will be undergoing, of the distress not only occasioned by that fear but also – and importantly – the distress he will inevitably suffer as he, a loving son, helplessly watches his parents' and his family's distress'. The judge 'did not judge it right to probe with him whether or not he knew how frightening it would be'.

Whether the Court decided the case on the basis that 'the first and paramount consideration ... [is] the welfare of [the patient]', a principle also accepted in this case, or on the basis that the minor lacks the capacity to refuse treatment, the result is the same: his or her refusal is overridden by the court. This would not be the case with a competent adult.

Complex or contentious procedures

Neither the *Gillick* case nor *Marion's* case considered specifically the issues that may arise when a 'mature minor' seeks complex or contentious procedures. What is a doctor's position, for example, if a mature 15-year-old girl wants to have an abortion (assuming it is otherwise lawful), or to have cosmetic surgery? The law is not clear but it would appear, according to the general principles stated above, that if after carefully explaining the procedure the doctor is satisfied that the girl is sufficiently mature to understand what is involved, then the treatment would be lawful on the basis of her consent alone. In both cases, however, the doctor would generally be well advised to try to persuade the girl to inform her parents, and to obtain their consent as well. Then, if a question later arose about whether the girl was mature

enough to consent, the doctor would be protected by the parents' consent and thus be in a better position legally if he or she were sued for operating without adequate consent.

Without parental consent, the doctor would have to rely on the *Gillick* principle that a mature minor may consent if she understands fully what is proposed (and possibly that the procedure is also in her best interests). The *Gillick* case concerned the provision of contraceptives, a non-invasive procedure. If the principle of the mature minor were to be applied to more serious treatment, the onus would be on the doctor to show that he or she believed the young person was mature enough to consent. If the young person were less mature, or the treatment more severe, the doctor would bear a greater onus in assessing the level of maturity. However, the *Gillick* principle has not been applied in such serious cases in Australia.

It is conceivable that a doctor who is alleged to have acted on inadequate authority might rely on a defence of necessity. One writer expressed this as 'the moral advantage of maintaining confidentiality in the doctor–patient relationship outweighing that of adhering strictly to the law' (Mason 1989, p.45). The Law Reform Commission of Western Australia (WALRC), noting that doctors are prepared to treat patients under the age of 16 years without the consent of their parents, said that: 'Some doctors feel that it would sometimes be irresponsible to refuse to treat children who had demonstrated their maturity by seeking medical advice independently' (WALRC 1988, p.43). Again, these defences have not been tested and one cannot predict whether such a defence would be successful. However, whether the doctor's defence in treating a minor without parental consent is that of necessity or that the child was mature enough to consent, the doctor would also have to believe that the treatment was in the young person's best interests.

If a girl seeking an abortion refuses to tell her parents, the doctor may be justified in breaching confidentiality and informing the parents directly if there is a real risk to her health or wellbeing. However, there is no direct authority on this point and a doctor who decides that the parents should be told should obviously proceed very carefully and should inform the girl first. Likewise, the doctor could apply for a court

order authorising the abortion, but it is unlikely that an order would be made without first notifying the girl's parents.

If the parents refuse consent to a proposed abortion, a court may decide whether it is lawful for an abortion to be undertaken. In Victoria and New South Wales, this would require a finding that the abortion is 'necessary to preserve the woman from a serious danger to her life or her physical or mental health' and that, in the circumstances, the danger of the operation is not out of proportion to the danger to be averted (*R v. Davidson* [1969] VR 667, the 'Menhennit Rules'). This danger to the woman's life or health has been interpreted to include 'any economic, social or medical ground' to believe that there is such a danger (*R v. Wald* (1971) 3 NSWDCR 25). If the abortion meets these criteria, the court may declare that it is lawful even if the parents object, and that declaration is sufficient authority for the operation to be performed.

An example of the court overriding parental objection in such a case is found in *K*'s case (*K v. Minister for Youth and Community Services* [1982] 1 NSWLR 311), in which the guardian of a 15-year-old girl refused consent for an abortion which she and her mother wanted. The girl was a Ward of Court and, under the relevant legislation, the consent of the Minister of Youth and Community Services was necessary. The judge said that he was satisfied that the abortion was in her best interests and that it should be performed: 'There is a serious danger to her health, but … the adverse effects on her of being forced to bear her child are likely to be so grave that they make it essential.' In reaching this view, he '[leant] on the side of necessity as the guiding principle'.

Child consents, parents refuse

A child who is 'Gillick-competent', that is, sufficiently mature to understand a proposed medical procedure, is legally entitled to consent to it even if the parents object. That is clear from the *Gillick* case, in which Mrs Gillick was held not to be entitled to prevent her daughter from being given contraceptive advice, even if she thought her daughter was too young.

However, a court has wider powers than a parent and can override a child's consent if the court believes that to be in the child's best

interests (*Re R (a minor) (wardship: medical treatment)* [1991] 4 All ER 177). This means, for example, that if a mature child were determined to consent to a sterilisation procedure or to cosmetic surgery such as a 'tummy tuck' operation, a court could declare the procedure not to be lawful and so prevent it, whereas a parent could not.

Child refuses, parents consent

It would seem, as a matter of logic, that a child who is sufficiently mature to consent to treatment should also be mature enough to refuse it (as an adult patient is entitled to do, even if that causes the patient to die or to suffer adverse consequences). Indeed, that seems to have been the view of Justice McHugh in his dissenting judgment in *Marion's* case; however, he was the only judge to comment on this issue and his remark is not binding as it was made incidentally and only by him.

Justice Deane, also in *Marion's* case, said that parental power was a 'dwindling right' that decreased with the increase in the child's competence. He envisaged 'a transitional stage' during which such power would be shared between parent and child (*Marion's* case, p.294); this would seem to suggest that a parent could consent to treatment even if a child refused. Justice Brennan (as he was then) questioned whether 'the primacy of parental responsibility was sufficiently recognised in *Gillick*' (*Marion's* case, p.281), and stated that the exercise of parental authority for the welfare of a child would enable a parent to consent to therapeutic treatment 'whether or not the child consents' to it (*Marion's* case, p.278).

In a number of recent English cases, some judges have accepted that the refusal of a mature minor can be overridden not only by a court order if that is in the minor's best interests (*South Glamorgan County Council v. W and B* [1993] 1 FLR 574; *Re K, W and H (minors) (consent and treatment)* [1993] 1 FCR 240), but also, as Lord Donaldson said in two other recent cases, by a parent's consent (as noted earlier in *Re R*; also *Re W (a minor) (wardship: medical treatment)* [1992] 4 All ER 627).

The case of *Re R* involved a 15-year-old girl with a history of family problems. The child had been placed in a children's home after a fight with her father, but became more disturbed, once threatening to

commit suicide and another time attacking her father with a hammer. With her consent, she was placed in an adolescent unit and sedated periodically. However, at times she was paranoid, argumentative and hostile, and the unit wanted to give her anti-psychotic drugs. In her rational, lucid periods, she objected to taking the drugs. The local authority applied for leave from the Court to administer medication, including anti-psychotic drugs, whether she consented or not. The Court of Appeal upheld the decision of the judge to whom the application was first made; that compulsory medication could be given even if the girl was 'Gillick-competent' and refused. Lord Donaldson said that: 'In a case in which the Gillick-competent child refuses, but the parents consent, that consent enables treatment to be undertaken lawfully … [the child] will have a power to consent, but this will be concurrent with that of a parent or guardian' (*Re R*, pp.185,-187).

It follows from this statement that if a mature minor refused treatment but a parent consented, that would, according to Lord Donaldson, be sufficient authority for the doctor to proceed. However, as he emphasised, the parent's consent would not *require* the doctor to treat; rather, whether treatment is appropriate is 'dependent upon an exercise of his own professional judgment' (*Re R*, p.187). The child in that case was, in fact, found to be not competent due to the psychiatric condition, but the Court of Appeal held that parental consent would have been lawful even if the child had been competent.

The second English case, *Re W*, concerned a 16-year-old girl who refused treatment for anorexia nervosa. She had been orphaned at 8 years-of-age and had experienced unhappy foster care, a progression of doctors, depression, anorexia nervosa, violence towards treatment staff and compulsive self-injury. She had reached the point where 'it was agreed medical opinion that, should she continue in this way, within a week her capacity to have children in later life would be seriously at risk and a little later her life itself might be in danger' (*Re W*, p.636).

The girl was admitted to a specialised adolescent residential unit run by a specialist psychiatrist but, because her physical condition was deteriorating, it was proposed that she should be transferred to a hospital specialising in treating eating disorders. However, she did not want to go and refused to be moved. The local authority applied to the

Court for an order that she be moved to the hospital and given treatment without her consent, if that was necessary. The judge who heard the application ruled that although 'W' had sufficient understanding to make an informed decision, she should be moved to the hospital and treated without her consent. She appealed.

The Court of Appeal ordered that, despite her refusal, 'W' should be fed with a naso-gastric tube. Lord Donaldson presided in this case, as he had in *Re R*. He said that although the wishes of a Gillick-competent child 'are of the greatest importance both legally and clinically' (*Re W*, p.637), the Court could override those wishes if the circumstances were such that, without treatment, she would in all probability suffer permanent injury. Moreover, he said that the 'flak-jacket' of consent that protects a doctor from an action in battery (treatment without consent) could be given *either* by the patient or by 'another person having parental responsibilities'; '[t]he doctor needs only one [flakjacket] and so long as he continues to have one he has the legal right to proceed' (*Re W*, p.635).

It is not certain that an Australian court would take the same approach as Lord Donaldson as the matter has not arisen here. In *Marion's* case, the majority judges approved the general principle stated in *Gillick*, that a mature child who can fully understand what is proposed is legally entitled to consent. Adopting the opinion of Lord Scarman in that case and the comment of Justice McHugh mentioned earlier is not conclusive (especially in view of the comments of Justices Deane and Brennan), and the matter is still open. However, even if Lord Donaldson's approach were to be followed, it would be limited to extreme cases. Lord Donaldson himself emphasised that it is 'self-evident' that minors should be given 'the maximum degree of decision-making which is prudent', and that 'Prudence does not involve avoiding all risks, but it does involve avoiding risks which, if they eventuate, may have irreparable consequences or which are disproportionate to the benefits which could accrue from taking them' (*Re W*, p. 638).

Consent and ethics of treatment

There are some procedures that cannot be lawfully undertaken on a child even if consent is given both by the child and the parents, and

the doctors believe the procedure to be in the child's best interests. These procedures are 'ethically contentious', or raise doubts about whether they are really in the child's best interests.

Gender reassignment surgery on a child is a case in point. Even if the child wants the surgery and his or her parents agree, court approval must be sought. This is illustrated in *Re A (a child)* (1993) FLC 92–402 (*A*'s case), a case involving a 14-year-old girl. 'A' was conceived a genetic female but was masculinised due to an abnormality in the adrenal gland. She had genital reconstruction to make her look more feminine and was given female hormones. However, as she grew older, she became even more masculinised and felt she would be better as a male. When 'A' reached 14 years-of-age, her mother applied to the Family Court to authorise gender reassignment surgery: 'bilateral mastectomies, a hysterectomy and oophorectomy, ... [and] a closure of the labia to create the appearance of a scrotum and the insertion of prosthetic testes'.

The Court was satisfied that 'A' (to whom it gave the male pronoun) had a general understanding of the problem and the proposed surgery, and desired it. It was not satisfied, however, that 'A' had 'sufficient capacity and maturity to fully appreciate all aspects of the matter and to be able to assess objectively the various options available to him'. It was therefore necessary for someone else to consent on his behalf. The Court said that, in relation to these procedures, it was 'not within the ordinary scope of parental power to consent to medical treatment ... [and] court authorisation ... [was] a necessary "procedural safeguard" '. The Court then went on to authorise the application, largely on the basis of evidence from a psychologist that 'there ... [was] a probability of very serious negative consequences to A' if the application was rejected.

Conclusion

It can be seen from this discussion that, although parents generally have lawful authority to consent to medical procedures for infants and young children, that authority is not unfettered; it is effective only when they are acting in the best interests of the child. If there is any doubt about whether a parent's decision is, in fact, in the child's best

interests, such as where the parent or parents want a child to be sterilised or treatment withheld or withdrawn, any person may apply to a court either to have the parents authorised to decide in that way, or to override the parents' decision.

A parent's authority also generally decreases as the child gets older, so that as a child becomes old enough to understand fully what is proposed in a medical procedure, the child is able to consent him or herself, even if the parent disagrees. The age at which this occurs depends on the age and maturity of the child and the nature of the procedure in question. For relatively simple procedures, the age may be quite low. Even a child of eight or nine years could probably consent to minor, non-invasive procedures.

For more serious or ethically contentious procedures, such as the supply of contraceptives or an abortion, the child must be older; however, there is little legal authority to guide parents and health professionals in Australia. It is also unclear as to when children are entitled to refuse treatment that their parents want them to have; it appears that children can be mature enough to consent to treatment, but not mature enough to refuse it, particularly if they will die or risk serious consequences without it. The law in this area is still developing, and it is difficult to predict in advance how a court would decide a particular case.

It may be thought that the implementation of the United Nations Convention on the Rights of the Child may increase the child's right to make medical decisions. However, although the Convention has been ratified by Australia, it does not become part of the domestic law until legislation is enacted to give effect to its provisions. The legal effect of such international agreements is problematic. Justice Nicholson (1993), for example, has sceptically observed that countries that have ratified the Convention without legislating to give effect to it are 'in the happy position of appearing to adhere to principles which they are not prepared to put into practice'. Moreover, he considers that 'while the Convention ... is of persuasive significance ... its requirements are frequently ignored'. Nevertheless, he noted that the Human Rights and Equal Opportunity Commission has intervened in a number of cases (such as *Marion's* case) 'to place relevant human rights

issues before the Court', and courts have an undisputed power to act in a child's best interests by authorising treatment or declaring treatment unlawful (Nicholson 1993, p.8).

A more fundamental problem, perhaps, both for courts and health professionals who have to decide whether a young person can consent to treatment without parental involvement, is the aspirational language of the Convention and the potential conflicts between the 'rights' it proclaims. For example, the perceived 'best interests of the child' may seem to require that the child's views should be overridden – the familiar conflict between beneficence and autonomy so often encountered in health and medical terms. Whereas autonomy may be allowed to dominate when the patient is a competent adult, the law has always been conservative in protecting the interests of children. For this reason I think that, despite the growing recognition of children's rights in other avenues of life, it will be some time before the courts will allow even the most mature minors to refuse life-saving procedures.

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9
Income Support for Children and Young People

Anthony King

In a society with a mixed economy like that of Australia, people's incomes are the single most important factor determining their material standards of living and, arguably, also their capacities to participate fully in society. The distribution of income is fundamental to the distribution of wellbeing as are, correspondingly, measures to redistribute income through income support. The purpose of this chapter is to consider children's and young people's rights to income support. Implicitly, the issue of children's and young people's rights to income support is also a question of their rights to a certain standard of living in terms of the things that money can buy.

What rights to income support do children and young people have in Australia? A first level at which to address this question could be through reference to the growing literature on comparative welfare state analysis, where a frequent point of distinction is the nature of rights to income support. Thus, Esping-Andersen (1990), in a seminal work, distinguished three broad types of welfare state regimes. The first type, the 'liberal' welfare state, is characterised by means-tested and modest levels of assistance with entitlements depending on demonstrated need. Esping-Andersen (1990) argued that these systems 'do not properly extend citizen rights' (p.48). The second type, the 'corporatist' welfare state adds a contractual element of social insurance, with rights conditional on labour market attachment and social security contributions. Thirdly, the 'social democratic' regime was identified with a basis in universal rights of citizenship. Under this type, entitlements depend on being a citizen or long-term resident, rather than on need or labour market history.

Esping-Andersen located Australia in the first of these three types and, while this view has been qualified and elaborated by a number of Australian researchers, it does provide the flavour of the Australian income support system. To go beyond this broad context, however, we really need to consider the nature of the main income support programs with relevance to children and young people, and this is the approach adopted in this chapter. Before embarking on an account of these programs, two preliminary steps are to define the scope of this review and to assess the contribution of any broad statements about the rights embodied in the Australian income support system.

The scope of income support

A necessary starting point is to determine what is meant by income support. A narrow definition of income support might only include cash payments from government, such as pensions and allowances. But does this mean that, if a cash payment for a particular good or service is replaced by a direct subsidy which reduces the price of that good or service, then the subsidy should no longer be counted as income support even though its effect is broadly unchanged? Housing assistance in Australia provides a good example. The cash rent assistance paid by the Department of Social Security is clearly income support, but are the subsidised rents paid by public housing tenants also income support? They have the same effect of increasing the amount of income left for other purposes after paying for housing costs and so should be seen similarly.

The trouble with this argument for an expanded definition of income support is that it is difficult to know where to stop. The logic can be extended so that the provision by government of any good or service where the user pays less than its cost can be seen as a form of income support. For example, do we want to include road funding, with the transport benefits that it entails, as a form of income support? For some purposes we might, but here such broad infrastructural support is excluded. In this chapter, the focus is on cash income support though the scope is extended to the provision of selected subsidised services where they have clear connections with elements of cash income support, and the chapter also covers relevant elements of the regulation of market incomes.

In Australia's federal system, primary responsibility for income support lies with the Commonwealth Government, with the major programs administered by the Department of Social Security (DSS), the Department of Employment, Education and Training (DEET), and the Department of Human Services and Health (DHSH). The States and Territories also play important roles in the design and administration of some programs, notably in the areas of education and housing and, indeed, have some income support programs of their own. These State and Territory programs, however, are very varied and small in comparison to the Commonwealth programs, and their consideration is beyond the scope of this chapter.

The concern here is thus limited to the major Commonwealth income support programs; programs which are typically uniform in their application across the country. The provision of free primary and secondary education, while not covered in this chapter because of its treatment elsewhere in this volume, should also be recognised as a major component of income support for children.

Broad statements of rights

Are there any broad general statements of the rights to income support provided in Australian policy, or any specific statements of rights to income support applicable to children and young people? The legislative basis for the main forms of cash income support, the *Social Security Act 1991*, does not include any broad statement of the rights to income support, but is introduced in more functional terms. Thus, the Act begins with the short title of 'an Act to provide for the payment of certain pensions, benefits and allowances, and for related purposes' before launching into the minutiae of eligibility requirements, entitlements and administration for particular payments.

Perhaps the publicly stated objectives of the main policy development and service delivery departments can tell us something. The 'Departmental Charter' of the Department of Social Security (DSS 1994b, p.1) is 'to deliver social security entitlements with fairness, courtesy and efficiency'. The objective of the Children's Services Program in the Department of Human Services and Health (DHSH 1994, p.183) is 'to assist families with dependent children to

participate in the workforce and the general community, by ensuring that child care is affordable for low and middle income families and by improving the supply and quality of child care'. The 'objective' of the Education Assistance and Income Support program within the Department of Employment, Education and Training (DEET 1994a, p.175) is 'to promote equality of educational opportunity by improving access to, participation and retention in and completion of education through the provision of financial assistance'.

These are laudable objectives, but they are not statements concerning the rights of children and young people to income support. Closer examination of departmental objectives and guidelines does reveal mentions of rights, though in the context of administration rather than policy design. This is, nevertheless, an important dimension of rights to which we will return later.

Another place to look for statements of rights is in the annual social justice strategy statements which have been released by the Commonwealth Government since 1988. The first such statement defined social justice as comprising the following principles:

- 'a *fair distribution* of economic resources;
- *equal access* to essential services such as housing, health care and education;
- *equal rights* in civil, legal and industrial affairs; and
- the opportunity for *participation by all* in personal development, community life and decision making.' (Commonwealth of Australia 1988, p.i)

Further elaboration can be found in the 1992 statement:

> 'The Strategy is based on an affirmation of individual rights and of collective responsibility for community wellbeing. It recognises that all Australians have basic rights and entitlements, and all benefit from government programs at some stages of their lives.
>
> Social justice is about quality of life. It is about choices and opportunities as different points in a person's life are reached. It is about entitlement to education, health care, and affordable housing; about the right of families to receive assistance and the aged to receive services; and about the right for people in crisis or

facing difficult periods such as marriage breakup or unemployment or homelessness to receive special support.' (Commonwealth of Australia 1992, p.1)

Particular attention has been paid to youth in social justice terms. The 1989–90 Budget Statement, 'Towards Social Justice for Young Australians', sets out Commonwealth Government achievements and priorities against a review of youth policy announced in 1988. The review was undertaken against a background of the four principles of social justice listed above, with the objective: 'to ensure that all young people are given fairer and more equal access to opportunities and assistance which enhance their future employment prospects and provide an effective springboard into active, satisfying adult lives' (Commonwealth of Australia 1989, p.4). The specific aims of the review were to:

- 'maintain the current thrust of the Government's Youth Strategy of enhancing education, training and employment opportunities while developing additional measures to ensure that those missing out have better access to these opportunities;
- address the needs of particularly disadvantaged young people by providing them with access to secure accommodation, health services, and an adequate system of income support, and the need to integrate these with appropriate education and labour market assistance; and
- take account of the respective roles of government, young people and their families and local communities in addressing these problems.' (Commonwealth of Australia 1989, p.4)

More recently, Commonwealth and State and Territory youth ministers have endorsed a statement of principles and objectives of youth policy (Australian and New Zealand Youth Ministers 1993). The introduction to the document acknowledges Australia's ratification of the United Nations Convention on the Rights of the Child (the Convention) and defines young people as those aged from 12 to 25 years inclusive. The agreed principles of youth policy, basically the

social justice principles mentioned above, are followed by objectives in particular areas of policy. The objective of youth income support is: 'To promote an adequate, equitable and accessible system of income support which:

- maximises participation by all young people in education, training or employment; and
- encourages young people who have left school early and/or are unemployed, homeless, or without the support of parents, to undertake further education, training and/or employment.' (Australian and New Zealand Youth Ministers 1993, pp.14–15)

These statements provide a flavour of the nature of income support for children and young people. Although they do not provide a developed basis for rights to income support, they do provide some principles and objectives (with acknowledged roots in the Convention) against which practice may be evaluated.

Program entitlements

To get a clear picture of the rights to income support for children and young people in practice, we need to look at the actual programs. Who is entitled to what? In considering existing programs, the confines of this chapter mean that the account is necessarily broad. It is neither possible to describe every program, nor to present all the details and provisions of any program. Rather, the aim is to provide an account of the general conditions of eligibility and entitlements under the main income support programs which apply to children and young people. A description of current entitlements alone would, however, give only part of the picture. Over the past 10 years or so, the income support system has been subject to much change and more has been foreshadowed. Accordingly, recent and prospective developments are also described.

A fundamental distinction in programs of income support for children and young people is the matter of the persons to whom assistance is directed. Cash payments are not, of course, handed to 2-year-olds for them to then spend as they wish. Much of the income support

for children and young people is directed instead to parents or legal guardians. This chapter covers both entitlements for children and young people, and entitlements for parents in respect of children and young people.

The point at which income support shifts from indirect payment to parents to direct payment to young people is, as will be seen, an important and recurring issue, and a corresponding distinction is made in the account of entitlements which follows. The next section describes entitlements over the early years up to around the age of 16 years, when income support is primarily provided indirectly to parents, with the following section then covering the transition to direct entitlements. The material is drawn together in the final part of the chapter which addresses questions about the nature of the rights in the system of income support for children and young people.

Entitlements over the early years

The discussion of entitlements in the early years of life begins with the main cash income support programs provided under the *Social Security Act 1991* (DSS 1995a). There are two distinct types of payment. Firstly, there are a number of payments designed to contribute to meeting the living costs of children. These are generally referred to as Family Payments. Secondly, there are payments which support people who are caring for dependent children. Policy on child maintenance is included here in the first section. The description then moves to assistance with particular costs of children: child care, health and housing. To gain an impression of the relative magnitudes of different payments and of means-testing arrangements, it is necessary to refer to dollar amounts. Rather than sprinkle these through the discussion, they are collected together in Table 1 for ease of comparison.

Cash income support for children

Three key features of the Australian social security system are: the provision of payments on a categorical basis; means testing; and the funding from consolidated revenue. Eligibility for payments is defined in terms of whether certain characteristics of the individual or family fall into defined categories, and the amount of payment is then

Table 1: Maximum value of payments and means test thresholds for selected income support payments for children, Australia 1995[a]

Basic Family Payment	
First, second and third child	$21.70 each pfn[b]
Each additional child	$28.90 pfn
Income ceiling	
one child	$61,020 pa
each extra child	+$3,051 pa
Assets ceiling	$359,250
Additional Family Payment	
Each child under 13	$67.20 pfn
Each child aged 13–15	$94.10 pfn
Income threshold	
one child	$21,700 pa
each extra child	+$624 pa
Assets ceiling	$376,750
Basic Parenting Allowance	$61.00 pfn
Child Disability Allowance	$69.50 pfn
Guardian Allowance	$30.10 pfn
Medicare (1994–95)	
Individual taxable income ceiling for exemption	$12,688 pa
Combined taxable income ceiling for reduction	$22,975 pa
(plus for each dependent child)	$2,258 pa
Income Tax (1993–94)	
Sole Parent Rebate	$1,137
Childcare Assistance[c]	
Maximum assistance	
one child	$96.00 pw
two children	$206.00 pw
Income threshold	
one child	$485 pw
two children	$515 pw
Childcare Cash Rebate Scheme	
Maximum assistance	
one child	$28.80 pw
two or more children	$62.55 pw
Rent Assistance	
Maximum payment	
one or two children	$77.00 pfn
three or more children	$88.00 pfn

Notes: (a) Amounts refer to August 1995 unless otherwise indicated
(b) pw = per week; pfn = per fortnight; pa = per annum
(c) Assuming full-time care in service charging standard rate

determined according to the level of other income received and assets held by the individual or family. This type of targeted and selective system can be contrasted with social insurance systems common in European countries, where entitlements are at least partly related to previous contributions; with universal systems, where there is no targeting; and with guaranteed minimum income systems, where low income alone is the basis for entitlements. The presence of dependent children is one important qualification for receiving income support in the Australian system. This qualification provides a type of income support which has the quality of a guaranteed minimum income system; at least with respect to the needs of children.

Family Payments

Cash income support to contribute to the additional costs of children is provided firstly through Basic Family Payment to all families with an annual taxable income of up to about $60,000 to $70,000, depending on the number of dependent children. This amounts to eligibility in respect of around 85 per cent of dependent children. For families relying on social security payments, or with similarly low private incomes, there is a further entitlement to cash assistance through Additional Family Payment, the level of which is related to both the number and age of dependent children. Around 25 per cent of dependent children receive this higher level of income support. Besides these two main payments, other elements of the Family Payments system provide additional income support for children in particular circumstances, such as Child Disability Allowance and Guardian Allowance for sole parents. All these payments are to the child's parent or legal guardian.

Changes in the Family Payments system over the past ten years have resulted in a substantial real increase in their value and tighter targeting; the latter feature often held up as necessary to achieve the former, given constraints on budget outlays. The increases in value date from the 1987 Family Package, which followed Prime Minister Hawke's commitment prior to the 1987 federal election that no Australian child would need to be living in poverty by 1990. These increases were accompanied by the introduction of automatic indexa-

tion and benchmark relativities to use in setting the level of Basic and Additional Family Payment.

The benchmarks set the sum of Basic Family Payment and Additional Family Payment at a level equal to 15 per cent of the married rate of pension for a child under 13 years, and 20 per cent of the married rate for a 13 to 15-year-old child. These relativities, including the introduction of the age distinction, were set with reference to research on the costs of children; technically, research into equivalence scales. The key question is about the amount of income needed to meet the costs of children. Research is unable to produce a definitive answer, though one aspect of the debate is of particular interest here. There is an argument held by some that the presence of children requires no compensation to parents through income support, on the grounds that having children is usually a matter of choice and that parents are compensated by other non-material rewards of having children. The counter viewpoint is that, even so, children have rights as individuals to a basic material standard of living irrespective of the non-material benefits they bring to their parents.

Tighter targeting saw the introduction in 1987 of means-testing of Basic Family Payment (or Family Allowance as it was then known), which up until then was a universal payment for families with dependent children. Tighter targeting has also led to a narrowing of the definition of an eligible child. Basically, a 'family payment child' is a dependent child under 16 years, or a secondary student who is not receiving an education allowance up until the end of the year in which they turn 18.

In 1993 there was a major restructuring of the way in which the components of family payments were paid. Previously paid separately from each other, or together with pension or benefit payments, the payments were combined into a single integrated Family Payment. The new arrangements were designed to simplify the system of payments for children, to make it easier for families to apply for assistance, and to increase the take-up of assistance. In addition, all child payments were now directed to the primary carers of children, usually mothers. The integration has, however, also had the effect of highlighting complexities and anomalies in the system of child payments. The

Commonwealth Government has stated its intention to review the system of child payments. Some changes to this effect were announced in the 1995–96 Commonwealth Budget, while there is also at present a broader climate of moves toward greater simplicity in the social security system (Baldwin 1995).

Child Support Scheme

Another important development motivated by a concern with the low incomes of some families with children, particularly sole parent families, was the introduction of the Child Support Scheme in 1988. The Scheme was a response to the widespread recognition by the mid-1980s that the majority of non-residential parents were not making regular maintenance payments. Where payments were made they were generally very low, and court-ordered maintenance was proving difficult to enforce. In broad terms, income maintenance of the children of separated parents had become a matter of public provision by taxpayers rather than of private provision by parents.

In contrast, the Child Support Scheme is clear affirmation of the view that parents remain financially responsible for their children even after separation, its primary objective being 'to improve financial support for children of separated parents by obtaining from non-custodial parents, contributions to the support of their children in accordance with their capacity to pay' (DSS 1994b, p.202). The Scheme seeks to do this through two key elements: a formula for setting the amount of maintenance to be paid; and a mechanism for payment involving powers to have maintenance payments withdrawn from wages and salaries or from bank accounts of the non-resident parent.

The machinery and legislation of the Child Support Scheme is very complex. There has been intense monitoring and review of the legislation since the introduction of the Scheme, which is probably to be expected with the implementation of a completely new policy in a particularly sensitive area. A useful account of the intricacies, as well as the development of the Scheme, can be found in the final report of the evaluation of the Scheme conducted by the Child Support Evaluation Advisory Group (1992). The Office of the Commonwealth Ombudsman (1993) reports on the difficulties that these intricacies, coupled with

administrative problems, have presented. The Scheme has certainly had some teething troubles, though the Child Support Evaluation Advisory Group (1992, pp.iii–iv) noted a significant shift in debate relating to the Scheme away from arguments about principles, now widely accepted, to disagreement about details. Evaluations of the Scheme have shown both an increase in the number of children covered by child support agreements and an increase in the average value of child support.

Cash income support for adults caring for children

The payments described above are designed to defray the direct costs of children. The other type of income support for children through social security payments is indirect, being income support for adults on the grounds that they are caring for children.

Sole Parent Pension

One longstanding such payment has been the Sole Parent Pension for sole parents who are supporting at least one child under 16 years or a student child aged 16–24 years who receives Child Disability Allowance. A major change to the Sole Parent Pension occurred in 1987 when the age limit for a qualifying child was reduced to 16 years. Previously, it had also been payable to sole parents whose youngest child was a dependent full-time student aged 16–24 years. The Sole Parent Pension is subject to the same income and assets tests as other social security pensions.

Parenting Allowance

Caring for children thus qualifies a sole parent for income support and, from July 1995, this qualification has been extended to members of low income couples, with the introduction of Parenting Allowance. This, however, is not so much a new entitlement as the residual of an entitlement being withdrawn. A major reform of the social security system announced in the 1994 White Paper on Employment and Growth (Keating 1994a, 1994b) was a shift towards individual entitlements for members of couples. Prior to July 1995, the partners of recipients of pensions and allowances were also generally entitled to income support purely by dint of being a partner, even if they would not qualify for any payment in their own right. This ceased.

> 'It would not be fair, however, to require all married women to search for work. Older women will receive a partner allowance, which will be paid directly to them. It would also not be fair to require women caring for children to search for work, if they would prefer not to leave their children and work full-time. In recognition of the care they do provide, these women will be paid a Parenting Allowance.' (Keating 1994a, p.15)

Parenting Allowance has been paid since July 1995 to the partners of income support recipients or low-income earners who are the primary carers of children under 16 years. The maximum rate of Parenting Allowance does not differ from the rate which would otherwise have been paid to the partners of income support recipients, though changes to income-testing arrangements for couples announced at the same time have meant that actual entitlements have increased for some and coverage has been extended to low-income earners. Thus, there is now explicit recognition that caring for children is a legitimate ground for income support for the primary carer in both one-parent and two-parent families. This basis for income support will be further strengthened with the introduction of a new Maternity Allowance in February 1996.

Maternity Allowance

That few women in Australia are entitled to paid maternity leave, has been the subject of increasing debate since the 1970s. An account of the debate, together with details of relevant international conventions, is provided by the National Women's Consultative Council (1993). The National Women's Consultative Council elaborated the arguments for paid maternity leave and discussed a number of options for funding a paid maternity leave system, while the National Council for the International Year of the Family (1994) proposed an infant parenting allowance to apply whether or not the parent had been in paid work.

This momentum towards provision of universal paid maternity leave took on a more concrete character when the terms of the agreement between the Commonwealth Government and the Australian Council of Trade Unions (ACTU), known as Accord Mark 7, were announced

in 1994. These included agreement to give consideration in the 1995–96 Budget to the introduction of 'a maternity allowance paid through the Social Security system, in the spirit of ILO Convention 103 (Maternity Protection)' (Keating 1994c). The introduction of Maternity Allowance from February 1996 was subsequently announced, with provision for an income-tested one-off payment from the Department of Social Security (DSS) of $816 to mothers of newborn children. The family income ceiling will be the same as that for Basic Family Payment; that is, with entitlement cutting out at annual incomes of around $60,000 to $70,000, depending on the particular circumstances.

Assistance with child care costs

Income support to defray the costs of child care is an area of policy which has experienced rapid development and expansion over the past 10 years, driven particularly by the growing recognition of the value of quality child care and as a lagged response to the increasing rate of married women's labour force participation. A useful account of developments has been compiled by the Australian Institute of Health and Welfare (1993). The involvement of the Commonwealth Government in child care assistance was marked by the *Child Care Act 1972*, which remains the relevant legislation though has failed to keep pace with the extensive policy developments in the area. Alongside other legislation administered by the Department of Health and Community Services, the Act is currently the subject of review, with a report by the Australian Law Reform Commission having been recently tabled.

Childcare Assistance

From the early 1980s, the emphasis of income support for child care shifted from provider subsidies towards means-tested fee relief – Childcare Assistance – for the users of formal child care services. Targeting of assistance accordingly shifted from being determined by the priority-of-access guidelines, which governed access to subsidised child care places, to a greater reliance on parental income. Childcare Assistance is means-tested with the level of assistance reducing to the

point where no assistance is provided at an income level similar to that where Basic Family Payment cuts out. The expansion of assistance with the costs of child care has been accomplished by a tremendous increase in the number of subsidised places, extending assistance to a wider range of types of care, and by extending eligibility for Childcare Assistance in 1990 to users of private child care centres. Increasing attention is now being given to the quality of child care, through the implementation of national standards under the Quality Improvement and Accreditation System.

Childcare Cash Rebate Scheme

From July 1994, however, the targeting and, indeed, the fundamental nature of assistance with the costs of child care changed. That date saw the introduction of the Childcare Cash Rebate Scheme, a rebate for work-related child care expenses for the parents of dependent children under the age of 13 years. The rebate operates on top of Childcare Assistance, is payable through Medicare offices, and is payable in respect of a range of child care providers as long as they are registered with the Health Insurance Commission. Of greatest significance, the Childcare Cash Rebate Scheme involves no means-testing; it is a universal cash payment for the families of children using approved child care services for work-related purposes. This scheme is quite remarkable in view of a decade which has seen progressively greater means-tested targeting of government cash benefits. The logic behind this apparent divergence from the trend was that 'all families are entitled, in the Government's view, to claim some recompense for the cost of work-related childcare' (Keating 1993, p.81).

Basic Parenting Allowance

The expanding diversity, as well as scale, of income support related to child care was also indicated by the transformation of a tax rebate into the Home Child Care Allowance in 1994. The Dependent Spouse Rebate had been a contentious element of the income tax system, though criticism was moderated from the mid-1980s when a higher level of rebate was paid where there were dependent children, and the rebate came to be seen as partial recognition for unpaid child care in the home. This view was strengthened by the Commonwealth Gov-

ernment's 1993 decision to cash-out the Dependent Spouse Rebate for families with dependent children and replace it with a new payment to be called the Home Child Care Allowance. The level of the payment would change little, with the value of the shift seen to lie rather in payment directly and frequently to the primary carer of children, instead of annually to the main earner. The initiative was presented as a counterpart to the Childcare Cash Rebate, which had been announced a few months earlier:

> 'We need to recognise that women's childcare needs are neither uniform or identical. There are new patterns and choices in women's lives today. Many women are choosing to stay home while their children are young, although most will return to the paid workforce at some time in the future. Policy needs to recognise and respond to these patterns ... Women at home and caring for children are entitled to proper acknowledgment and respect, and some practical assistance.' (Australian Labor Party 1993, p.30)

Home Child Care Allowance was paid through the Department of Social Security as a separate payment from September 1994 until July 1995 when it was incorporated as a component of the new Parenting Allowance and became known as Basic Parenting Allowance. Couples are eligible for Basic Parenting Allowance until their youngest child turns 16, with the payment income-tested only with regard to the claimant's income.

Health

There are three other major areas in which assistance with other particular costs of children is available. These are the areas of health, housing and education. Medicare has been a major element of the Australian income support system since 1984, with its universal entitlement to free health care being particularly beneficial to families around the time of a child's birth and during infancy. Medicare provides free health care in the sense that the user need not pay, with funding instead on an income-related basis through the Medicare Levy in the tax system. The presence of dependent children has some effect

on the amount of Levy payable as it enters into specification of the income thresholds below which only a reduced levy is payable.

Medicare does not, however, cover all costs related to health care. Additional assistance is provided through the health care card system for the recipients of social security pensions and benefits and their families. Still, one notable gap in assistance has been dental treatment. Most dental treatment is not covered by Medicare and, despite the availability to concession card holders of free dental treatment at certain public dental hospitals and school dental services, the availability of affordable and accessible dental care has been a particular source of hardship for low-income people. In response, a new Commonwealth Dental Health Program was introduced in 1994, which provides Commonwealth funds to the States and Territories to allow expansion of dental services for concession card holders.

Housing

Assistance with housing costs cannot be ignored as a contribution to the standard of living of children. With a few very particular exceptions, however (for example, homeless youth), provisions are made to the child's parents.

Rent Assistance

Assistance with housing costs is provided through two main means-tested income support programs: Rent Assistance, which is paid to private renters/boarders as a supplement to other social security payments; and rent rebates provided by the State and Territory housing authorities. Both programs take into account the presence and number of dependent children in the determination of entitlements. Substantial increases in the value of Rent Assistance have been a feature of social security developments since the late 1980s, and this has particularly been the case for families with dependent children. Over the period from 1989 to 1991, when the major increases in Rent Assistance were phased in, the structure of the payment was given an important child-related element and the maximum rates of Rent Assistance payable now depend on the number of dependent children.

Public rental

Other than Rent Assistance, the principal mechanism for the provision of direct housing assistance in Australia is the periodically renegotiated Commonwealth–State Housing Agreement, with the current 1989 Agreement given legislative authority by the *Housing Assistance Act* 1989. The primary principle of the Commonwealth–State Housing Agreement is 'to ensure that every person has access to secure, adequate and appropriate housing at a price within his/her capacity to pay' (DCSH 1990, p.4).

Public rental housing, with subsidised rents, is one of the main types of assistance provided under the Agreement. While the details vary from one authority to another, the presence of dependent children enters into means-testing for access to public rental housing. The presence of dependent children also affects rent-setting insofar as only a proportion of income from Family Payments is taken into account. This provision arose from a tussle between the Commonwealth and the States and Territories upon the increase in child payments in the late 1980s. While the States and Territories were reluctant to give special exemption from their rent-setting formulae to these increases, the Commonwealth largely prevailed with its position that the purpose of the increases was income support for children and this should not be diluted by automatic rent increases.

National benchmark of housing affordability

There are moves at present to establish a more coherent and uniform system of housing assistance; for example, by ensuring greater equity between those who are assisted through public rental housing and those who receive Rent Assistance. One particular initiative, stemming from the work of the National Housing Strategy, is the Government's consideration of establishing a national benchmark of housing affordability by the year 2000, with the suggestion that assistance would be provided to low-income people paying more than 20 per cent of their income on rent (Commonwealth of Australia 1992, p.39). A single benchmark of this type would, however, discriminate against larger households, notably those with children, and it is accordingly hoped that any such national benchmark will be a more elaborate and sensitive device.

The transition to independent incomes

The minimum school-leaving age in Australia is generally 15 years (16 years in Tasmania), signalling the point at which young people embark on other activities; particularly, post-compulsory education, paid employment, training or job search. It is the sixteenth birthday, however, which marks the shift in most forms of income support from indirect support through parents to direct support to the young person. The distinction, however, is not clear cut. The fact that young people aged 16 years and over are not considered to be dependent children may mean that they are no longer perceived as children, but it does not necessarily mean that they are no longer perceived to be dependent. On the other hand, there are some provisions for direct income support to young people under 16 years; notably provisions for young homeless people.

The nature of income support for young people is closely linked to their activities. It is accordingly useful to provide some context to the subsequent discussion by considering the extent to which young people are engaged in different activities. Schooling dominates as the principal activity up to the age of 17 years, with around half of all young people aged 18 years in some form of education or training. Paid work then increasingly becomes the dominant activity at older ages. The current pattern can be traced to successful moves since the early 1980s to increase markedly education retention rates, and to the collapse of the full-time job market for teenagers. Selected rates of payment and means test details for income support for young people are given in Table 2.

Students

The main form of income support for students is Austudy, administered by the Department of Employment, Education and Training under the *Student Assistance Act* 1973. Austudy pays a living allowance to full-time secondary and tertiary students who are either at least 16 years old or, if homeless, have reached the minimum school leaving age. Key features of the scheme include the structure of payments, which is related to age and living arrangements, and the means-testing arrangements (Table 2). Austudy is targeted, being described as 'a program of financial support for financially disadvantaged students taking full-time

Table 2: Maximum value of payments and means test thresholds for selected income support payments for young single people without dependants, August 1995

Austudy	
Maximum payment	
Under 18	
Standard	$134.50 pfn[b]
Away/Independent/Homeless	$222.10 pfn
18 and over	
Standard	$161.80 pfn
Away/Independent/Homeless	$245.60 pfn
Personal income threshold	$6,000 pa
Parental income threshold[b]	$21,660 pa
Parental assets ceiling	$375,630
Unemployment Allowances	
Maximum payment	
Under 18	
At Home	$134.50 pfn
Away/Independent/Homeless	$222.10 pfn
18–20	
At Home	$161.80 pfn
Away From Home	$245.60 pfn
21 or over	$301.50 pfn
Personal income threshold	$60 pfn
Parental income threshold[b]	$21,660 pa
Parental assets ceiling	$375,630
Pension	
Sole Parent Pension	$326.10 pfn
Disability Support Pension	
Under 21, as per JSA[c] plus Youth Disability Supplement	$69.50 pfn
21 and over	$326.10 pfn

Notes: (a) pfn = per fortnight, pa = per annum
(b) Amount is higher when there are siblings who are dependent children or full-time students
(c) JSA = Job Search Allowance

studies to enable them to continue their secondary and tertiary education' (DEET 1993, p.134).

Maximum Austudy rates for those aged 18 years or over are higher than for 16 to 17-year-olds, and within each age group the rates are higher for students deemed to be Independent, or needing to live away from home (Away From Home rate), than for others (Standard rate). Independent status is mainly determined on the basis of a

demonstrated work history during three of the past four years, though it is automatic upon the student turning 22. This age threshold is, of course, considerably higher than 18 years, the legal age of adulthood for most purposes. It is, however, lower than the age which applied up until 1992; the 1992–93 Commonwealth Budget included the announcement of a progressive lowering of the age for automatic Independent status from the then 25 years to 22 years in 1995.

This liberalisation, however, is to be partly reversed from 1996 following the announcement in the 1995–96 Commonwealth Budget that 20 to 24-year-old students living at home would be paid $20 per week less than their counterparts living away from home. The rationale for this amendment rested on the perceived benefits of parental support for those students living at home. Once again, full automatic independent status will not be conferred upon students until they reach the age of 25 years.

Besides the grounds of age and work history, students can also qualify for the Independent rate of Austudy on the basis of homelessness. Lack of a parental home provides grounds for Independent status when the student is either an orphan, a refugee with no parents in Australia and no long-term support, or when parents, for reasons such as imprisonment or mental incapacitation, cannot provide a home, care or support. Otherwise, students can qualify for the Homeless rate if they 'can prove that [they] can't live at home because conditions there threaten [their] physical or psychological health. This includes things like serious domestic violence, sexual harassment, extreme family breakdown or other exceptional circumstances' (DEET & NUS 1994, p.26).

All Austudy payments are means-tested. Largely as a result of this, only about 40 per cent of full-time students actually receive Austudy (Chapman 1992, p.62). All payments are subject to a test against the personal income and assets of the applicant. Students receiving the Standard or Away From Home rates of Austudy are also subject to parental means tests. This parental income test is quite stringent and is the most powerful element of the Austudy means tests. Another important aspect of Austudy is the method of payment. Generally, the living allowance is paid directly to the applicant. However in 1987,

the situation for under-18-year-olds living at home was altered. From 1987, parents of secondary students under 18 years and living at home could choose to have the Austudy allowance paid to themselves rather than to the student. Since 1994, Austudy allowances for this group of students are only paid to their parents.

As part of a major review of Austudy, the Chapman report (Chapman 1992) considered loans schemes as alternatives to the existing form of student allowances, and these were taken up in part by the Commonwealth Government with the introduction of the Austudy Supplement in 1993. The Supplement is a subsidised loan scheme with generous repayment provisions which enables part of tertiary students' grants to be traded in for a loan of double the value. This has also been available to students who would have qualified for Austudy if not for the parental income test in cases where family income is less than $50,000. The effect of the Supplement has thus been twofold: it has increased the amount, and extended the coverage, of income support available to students. The latter effect, however, will diminish from 1996, as it was announced in the 1995–96 Commonwealth Budget that no new Supplement loans would be provided from 1996 to students who do not otherwise qualify for Austudy.

A similar subsidised loan scheme exists for the payment of tertiary fees which were partly reintroduced in 1989 in the form of the Higher Education Contribution Scheme (HECS). Under HECS, tertiary students contribute to the costs of their higher education by paying about a fifth of the average cost of a place. HECS can be paid in two ways: either up-front, in which case a 25 per cent discount applies, or as an income-contingent loan. Some tertiary students are exempt from HECS; most notably, TAFE students.

Young unemployed people

Young people aged 16 to 17 years, and 15-year-olds in certain circumstances who are unemployed and available and looking for work, are eligible for income support in the form of Youth Training Allowance, which is administered by the Department of Employment, Education and Training under the *Student Assistance (Youth Training Allowance) Amendment Act* 1994 and paid through the agency of the Department of

Social Security. Those aged 18 years or over are eligible for unemployment allowances paid by the Department of Social Security under the *Social Security Act* 1991. There are two types of payment: Job Search Allowance, for people who have been unemployed for less than 12 months; and Newstart Allowance, for people who have been unemployed for 12 months or more. In most respects, there is no difference between these two payments which, together with Youth Training Allowance, will be referred to below using the general term of unemployment allowances.

Compliance requirements are a central element of income support for the unemployed. An unemployed person's continued receipt of allowance is dependent on their lodgement each fortnight of a statement detailing their efforts to find work or to improve their employment prospects. Receipt of Youth Training Allowance is conditional on the young person continuing to undertake approved education, training or job search activities. Job Search Allowance recipients need to satisfy the 'activity test', which requires that the recipient is actively looking for suitable paid work, is willing to undertake suitable paid work, and complies with any request from the Department of Social Security or from the Commonwealth Employment Service (CES) to undertake suitable paid work or to participate in training. Under Newstart Allowance, the activity test is in effect replaced by the Newstart activity agreement, which is negotiated between the unemployed person and the CES and sets out the activities to be undertaken in order to improve the unemployed person's employment prospects. The activity agreement is designed to allow assistance to be tailored to the individual needs of long-term unemployed people.

A fundamental and explicit aspect of these compliance requirements is the concept of 'reciprocal obligations'. Thus, income support and other assistance for the unemployed is not provided as of right, but is conditional on the unemployed person fulfilling specified obligations regarding job search and improvement of their employment prospects. If the unemployed person fulfils these obligations, then the Government will fulfil its obligations to provide income support and other forms of assistance. If the unemployed person does not fulfil their side of the bargain, then they are subject to penalties. Penalties are imposed in the form of periods of non-payment.

Unemployment allowances for young people looking for work have a similar payment structure to Austudy (Table 2), though the criteria for Independent status are less stringent and the full adult rate is paid from the age of 21 years. Parental means-testing only applies to 16 to 17-year-olds and only to part of the payment. To receive the Independent rate of Job Search Allowance, an 18 to 20-year-old needs only to live away from parents. An under-18-year-old needs to fulfil the following three conditions: to live away from parent(s) and to have done so continuously for at least 18 weeks; to have been unemployed or in work for at least 13 weeks while living away from parent(s); and to receive no regular financial support from parents.

Clearly, independence, in terms of access to adult and Independent rates of payment and the application of parental means tests, is viewed quite differently in the income support provisions for young students and for unemployed young people. The system of unemployment allowances embodies a more liberal view, though it should be noted that the consequent greater generosity is partly countered by the application of harsher personal income tests for the young unemployed than for students (Table 2).

The structure of payments for the young unemployed has not, however, always been like this and accounts of its evolution (King & Payne 1993; Wilson 1992) highlight considerations which have come into play in setting the terms of youth income support. Considerations of adequacy and the financial needs of people in different circumstances have been conditioned by a number of factors which have been variously persuasive at different times. These have included: perceived work incentives and a concern to maintain relativities with the wage system; budgetary restraint; the lowering of the age of majority and the federal voting age to 18 years in the early 1970s; a concern through the Common Allowance Structure to avoid incentive effects regarding whether young people are in education, training or are looking for work; concerns about incentives to leave home and views about parental responsibilities for financial support.

Particularly important changes for young people were made in 1988 when parental means-testing for young people under 18 years was introduced, together with the requirement that school leavers would

have to wait 13 weeks before becoming eligible for Job Search Allowance, compared to six weeks under previous arrangements. This new regime for those under 18 was heralded with the claim that it 'removes the financial incentive for young people to leave the education system ... [it] gives a positive message to those who leave school – either find work or undertake training' (Commonwealth of Australia 1987, p.6). It was also widely interpreted as evidence of a government view that the primary responsibility for the financial support of young people rested with parents.

The main force steering recent changes to the system of unemployment allowances has been the gradual move towards an 'active employment strategy'; that is, a philosophy that the provision of income support for the unemployed should be tied to labour market assistance, rather than the passive provision of income support alone. This move dates from the Social Security Review (Cass 1988), with an early nominal step in the purging of the term Unemployment Benefits from the social security lexicon in 1991; renaming it with the more positive connotations of Job Search Allowance and Newstart Allowance, with the Newstart activity agreement typifying the nature of the active employment strategy. Changes in this direction were accelerated by initiatives announced in the 1994 White Paper on Employment and Growth (Keating 1994a, 1994b).

The single theme running through the 1994 White Paper on Employment and Growth (Keating 1994a, 1994b) was skills enhancement. A highly skilled labour force was seen as the key to future economic growth, and the acquisition of skills by individuals was seen as the key to their success in the labour market. The White Paper announced major reforms to labour market assistance, education and training and income support. The acceleration of reforms in vocational education and training, the considerable expansion of entry-level training places, and changes to the provisions of unemployment allowances, are of particular relevance to young people.

Job Compact

The changes to income support for unemployed people were very much in the direction of the active employment strategy, involving the

closer integration of income support and labour market assistance. The centrepiece of the reforms to labour market assistance was the Job Compact, a package of measures for people 18 years and over who have been receiving an unemployment allowance for 18 months or more.

The Compact includes individual case management, and provision of a job for from six to twelve months, sometimes combined with training. In the spirit of reciprocal obligations, the other side of this enhanced assistance was stiffened penalties for those who declined to take up the jobs offered. Other general changes to unemployment assistance included some modifications to the income test and a broadening of the activities in which people can take part without losing eligibility for an unemployment allowance; in particular, voluntary work, training and the development of self-employment initiatives.

Youth Training Initiative

For young unemployed people aged less than 18 years, the White Paper announced the introduction of the Youth Training Initiative from January 1995, involving intensive case management, an expansion of vocational and training places for young people, and a new form of income support.

> 'The Youth Training Initiative (YTI) will send a strong signal to young people about the importance of being in education or training. The YTI will make sure that help will be provided at an early stage in the unemployment cycle to assist young people into worthwhile education, training or work opportunities.' (Keating 1994b, p.95)

Intensive case management is designed to provide young unemployed people with the assistance of a specific case manager in finding a suitable work, training or education placement. In general, case management begins 13 weeks after the young person registers as unemployed. Earlier assistance is provided for people in high-risk groups. The Initiative further undertook to provide a labour market or vocational training place and job search assistance for all those still unemployed six months after registering.

The other strand of the Youth Training Initiative was a new form of income support. This is the Youth Training Allowance, which replaced

Job Search Allowance for young people aged less than 18 years from January 1995, with the intention to 'encourage young people to undertake education and training' (Keating 1994b, p.96). It included 'a greater reciprocal obligation for recipients to undertake approved education, training, work experience or job search activities' (Keating 1994b, p.96). This greater reciprocal obligation occurred through Youth Training Allowance becoming subject to the same increased penalties for non-compliance mentioned above.

Young people in training and employment

There is a range of labour market programs administered by the Department of Employment, Education and Training which provide income support in a variety of ways for young people in training and/or employment (DEET 1994b). The main form of direct income support is Formal Training Assistance, which provides a basic level of payment equivalent to the corresponding amount of unemployment allowance. Another and indirect form of income support occurs in those labour market programs which involve subsidies or rebates to employers, such as the wage-subsidy program JobStart. In effect, the Government is paying a component of the award wages for people in these programs.

Government involvement in the setting of award wages is another way in which policy affects the incomes of young people. There are important changes underway here, such as the phasing out of age-related wages and the introduction of national training wages. Most workers in Australia are entitled to legal rates of pay prescribed in awards and determinations of Commonwealth and State or Territory industrial tribunals or in collective agreements registered with the tribunals. These awards generally specify less than adult wage rates for young people. There are a considerable number of awards with much variation among them and no standard age-related structure. A typical structure pays 15-year-olds, 40 per cent of the adult rate; 16-year-olds, 50 per cent; 17-year-olds, 60 per cent; and so on up to 21-year-olds, who receive the adult rate.

Mounting arguments that wage levels should, rather than being age-related, be based on skills or competencies, which better describe the value of the worker, have culminated in provisions of the *Industrial Rela-*

tions Reform Act 1993. The Act outlaws age discrimination in wage agreements, with age-related elements in all awards to be removed within three years from June 1994. Does this mean that young workers will henceforth receive the equivalent of adult wages irrespective of their age? The answer here would be 'yes', if they have somehow acquired the skills commensurate with those of an adult worker. But because such skills take a number of years to acquire, they will continue to receive lower wages under a competency-based structure.

In line with the move towards a competency-based wage structure, is the establishment of a National Training Wage structure, which is integral to the operation of the Job Compact announced in the 1994 White Paper. The National Training Wage is protected by the award system and applies where employers provide recognised training under the Job Compact and other programs. Training wages did already exist for young people, but these varied with industry-specific rates and had been seen as confusing and were often inconsistent with other rates in an award. They were also age-based.

The new National Training Wage, with equal application to adults and young people, involves a structure of rates based on the level of secondary schooling achieved, additional experience and training, time since leaving school, the level of skill associated with the work and training, the period of training undertaken and the type of labour market scheme. Upon its introduction, the lowest weekly training wage of $125 applied to someone who left school at Year 10 or earlier, had no further experience, and was undertaking training for 50 per cent of the time. The highest training wage, $333 per week, applied to someone who had completed Year 12, had three years of labour market experience, and was acquiring trade-related skills.

Other grounds for income support

Besides unemployment allowances, at the age of around 16 years, young people may become eligible for other means-tested income support payments from the Department of Social Security. The main grounds for qualification are sickness, disability, or having a dependent child, although there is also a discretionary payment in the form of a Special Benefit, which is of particular important to young people.

Eligibility for Sickness Allowance generally applies from the age of 16 years, with similar provisions to those for unemployment allowances. The Disability Support Pension is available to eligible young people aged 16 and over, with this pension paid at the same rates as unemployment allowances though with an additional Youth Disability Supplement equivalent to the value of the Child Disability Allowance. Special Benefit, a discretionary payment for people in severe financial need, has particular relevance for homeless young people under 16 years who do not qualify for any other income support payment because of their age. Thus, almost 1600 of the 26,000 recipients of Special Benefit at June 1994 were aged under 16 years, with a further 600 aged 16–17 years. Most of these people were receiving a Homeless rate of payment (DSS 1994a).

A young person's qualification for Sole Parent Pension is simply sole parenthood; there are no age restrictions. Having a dependent child, whether the young person has a partner or not, satisfies the eligibility requirements for the various family payments described earlier. Furthermore, young people receiving a social security allowance who have a dependent child are exempt from parental means-testing and receive payment at the full adult rate, irrespective of their age or living arrangements. Being married, including de facto partnerships, is another basis for exemption from parental means tests and also automatically qualifies a young person for the equivalent of the Independent or Away From Home rate of a social security allowance.

Assistance with particular costs

All Australian residents are entitled to Medicare benefits. Age is immaterial. Age does, however, have some significance in the Medicare system in terms of young people's rights to medical privacy. A parent is entitled to any information about their child's medical consultations if the child is listed on the parent's Medicare card. Only when a young person turns 15 are they generally entitled to their own Medicare card.

With regard to assistance with housing costs, it is only recently that young people receiving social security payments have acquired the same entitlements to Rent Assistance as have other social security

recipients. Coverage was progressively extended after 1986, and particularly since 1992. There has, however, been no general counterpart paid as a supplement to Austudy, though students receiving Austudy at the Homeless rate were granted eligibility for Rent Assistance from January 1995.

Even where Rent Assistance is received, however, many young people living away from home confront considerable problems in finding affordable and suitable accommodation. In response, the Commonwealth Government in 1993 announced the development of a National Youth Housing Strategy over two years. Work on the Strategy is currently underway, with the broad objective to 'set clear goals and objectives and a plan of action to improve the housing options for independent young people on low incomes'. The interrelationship between housing and income support for young people is one of the particular matters to be addressed in the development of the Strategy (Maas 1995).

The nature of the rights to income support

Having described the main elements of income support entitlements for children and young people, we turn to consider the question of the nature and extent of the rights that exist in this system of entitlements, before focusing on four broad areas where the specification or exercise of these rights leaves something to be desired.

What sort of rights are these?

If we take the view that rights are entitlements which are bestowed universally and without any obligation on the part of the recipient, then there are really only two elements of the income support system for children and young people which would be considered rights. These are Medicare and the provision of free primary and secondary education. In contrast, most elements of the Australian income support system for children and young people can be termed conditional rights, with the conditions reflecting the categorical and targeted nature of the system.

If someone can demonstrate their eligibility for a payment and also, in most cases, that their private income and assets do not disqualify

them from receiving assistance, then they have a right to receive their entitlement. It is a right, not a privilege. Such an interpretation of the rights in the income support system is illustrated by the approach to social security payments taken by the Welfare Rights Centre (1994) in its handbook.

> 'A basic philosophy underpinning the Handbook is that the social security system is based on rights, entitlements, responsibilities and obligations which should be clearly stated and legally enforceable. Social security payments are not made as an act of charity to individuals whom the bureaucracy considers to be worthy of assistance.' (p.1)

Put another way, the income support system is replete with 'reciprocal obligations' to varying degrees. These range from the continuing and considerable obligations which apply to the recipients of unemployment allowances to far less demanding requirements for some other payments. This form of income support has been described by Perry (1995) as approaching what she termed a 'conditional minimum income' model where means-tested assistance is provided according to need and subject to reciprocal obligations, and where residents have 'a right to protection against poverty, provided they met these conditions' (p.42).

This model is contrasted with a 'basic income' model where residents have 'a right to a minimum payment, regardless of circumstances or means' and a 'guaranteed minimum income' model where residents have 'a right to protection against poverty' (Perry 1995, pp.38–41). The essence of the rights in the Australian social security system is their conditional nature, though it is still possible to describe parts of the system, such as payments to families with dependent children, as amounting to a guaranteed minimum income.

As the preceding sections have sought to illustrate, there is a detailed legislative policy basis for these conditional rights to income support specifying entitlements and the conditions which need to be fulfilled in order to receive them; the detail, in part, reflects the small place for discretion in the income support system. There is also a legislative basis to the manner in which income support is delivered

and the *Social Security Act* 1991, for example, includes a section on principles of administration. These include matters such as the provision of advice and information, delivery of services in a 'fair, courteous, prompt and cost-efficient manner', special attention to the needs of disadvantaged groups, and the need to be responsive to Aboriginality and to cultural and linguistic diversity. Despite the largely mechanistic nature of the income support system and the attention to administrative procedures, questions of entitlement do still arise. In such cases, there are legislated rights of appeal to independent bodies such as the Social Security Appeals Tribunal and the Student Assistance Review Tribunal.

Taken together, various conditional rights give eligibility to a substantial program of income support for children and young people. It is, however, restricted largely by means-testing to provide maximum levels of assistance to low-income families. With increasing income or assets, entitlements diminish, steeply in many cases but gradually in others so that some assistance is still provided to middle-income families of children or young people. Within the confines of this targeting, there is universal assistance towards the costs of children, expanding assistance for the living costs of adults caring for children, expanding and diversifying assistance with child care costs, and child-related forms of assistance with housing costs. For young people, the picture is of entitlements linked to activities, parental means-testing, and payments related to age and living arrangements under some programs, and to skills and competencies in others.

In reviewing these rights to income support, one approach would be to identify any gaps in the coverage: children or young people in particular circumstances who do not appear to have the entitlements of others. This approach is not, however, pursued here; partly because it demands a more detailed consideration of programs than is possible in this chapter. In this regard, it should be remembered that the above description of entitlements has covered only the basic provisions of the main programs. A number of programs, provisions and procedures designed to provide more appropriate assistance to particular groups, such as Aborigines and Torres Strait Islanders, for example, have not been mentioned. Rather, the approach taken here is to consider the

nature of the rights to income support and, in particular, five matters which have the potential to quality the rights engendered in income support entitlements. These are issues of the take-up of entitlements; the adequacy of entitlements; the relationship to young people's transition to independence; the quality of entitlements; and parental responsibility.

The receipt of entitlements

The fact that someone has an entitlement to some form of income support does not automatically mean they will receive it. They may be unaware of the entitlement or they may be unsure about what is required by them to receive the entitlement. For example, the take-up rate for Family Income Supplement, which from 1983–87 was the smaller forerunner of Family Allowance Supplement, was notoriously low. Since that time, however, much greater effort has been made to inform people about their entitlements and how to claim them. Still, there remain concerns about the take-up of some payments; particularly payments for young homeless people. More generally, the increasing complexity of the income support system is a cause for concern.

A means-tested income support system is inherently complex, and the increased targeting in the Australian system, coupled with the rapid pace of the introduction of new payments and the transformation of other payments, has increased the complexity. It does not matter that many of the changes have been heralded as rationalisations or simplifications. Rationalisations in one area tend to throw up anomalies elsewhere with corrections then added in response. This feature of increasing complexity has been the case with income support for both children and young people. The Family Payments system is a good example; bringing a number of payments together in the pursuit of simplification has served to highlight anomalies and prompted review. While it is easy enough to get a grasp of the various elements of the income support system for children and young people, it is no mean feat to comprehend fully the detail of a single program such as the Child Support Scheme. There is a great deal of small print in the income support system.

So, what is wrong with complexity? Should it not be accepted as a sign that our largely categorical and means-tested system is designed to be sensitive to the diversity of people's circumstances? To an extent, yes. But there is a trade-off in terms of the ease with which people negotiate their way through the income support system. Even if people are aware of entitlements, complicated requirements for claiming can lead to delays in receipt; for example, if forms are not completed correctly, or the required documentary evidence is not furnished. Where the entitlement is small, the effort of claiming may seem too much to make it worthwhile. Complexity also increases the risk that an entitlement will be assessed incorrectly. Research at the Social Policy Research Centre (NSW) with recipients of social security payments for dependent children and young people has found instances of all these types of effect. In this research, even with assistance from the Department of Social Security, it has proved very difficult to ascertain exactly what the entitlements of some people are in certain particular circumstances.

While it is believed that, in the vast majority of cases, people receive their income support entitlements for children and young people, this is of little consolation to those who do not. Increasing complexity in the income support system makes it more difficult to meet the goal that all people receive their entitlements to income support. Accordingly, the attention currently being given to this question (Baldwin 1995; Perry 1995) is most welcome.

Adequacy of entitlements

A conditional right to an income support entitlement says nothing about the level of that entitlement in terms of some standard of adequacy. Instead, the income support system partially relies on relativities in the setting of rates. Thus, a target for the rate of pension is 25 per cent of average weekly earnings, and the combined level of Additional Family Payment and Basic Family Payment is broadly set with reference to relativities with the married rate of pension: 15 per cent for children 12 years and under, and 20 per cent for 13 to 15-year-olds. Relativities are largely maintained through the automatic indexation of virtually all income support payments and most means-test thresholds and ceilings.

One of the difficulties in addressing questions of adequacy in the income support system is that there is no single standard for an adequate income. One might appeal to a measure such as the Henderson Poverty Line (Henderson 1975) but the result may be no more than an interminable debate about some aspect of the measure, such as the relative weight given to the costs of children. The Department of Social Security is currently reviewing the use of benchmarks of adequacy in setting its payments. Research being undertaken for the review promises to improve greatly our ability to assess the adequacy of payments (DSS 1995b).

In the meantime, this problem can be partly avoided by focusing on the relativities in the system rather than the absolute amounts. For example, if it is right that a 21-year-old unemployed person receives a given amount, is it right that a 20-year-old should receive a certain amount less? Pursuing this logic, we can conclude unambiguously that many payments for young people in the income support system provide less than adequate assistance according to the standards of the income support system itself.

Why are the Independent and Homeless rates of payment less than the adult rates, given that financial independence is presumed? The reason is that the rates are depressed because of concerns about the effects on work incentives and on incentives to leave home. Adequacy has been explicitly compromised. Another basis for concern with the adequacy of payments for young people arises where a low level of payment presumes financial support from parents. Where parents are either unwilling or unable to provide such support, then the level of assistance will be inadequate. This is an issue with broader connotations concerning the transition to adulthood.

Parental support and the transition to adulthood

While the fundamental reasons for providing income support for children and adults may be the same, the ways in which cash income support is delivered are quite different. For the former it is through the intermediary of an adult, while for the latter it is direct. The manner of payment reflects a certain view of financial responsibility and dependency, and thus indirect payment for young children is uncontroversial.

However, the manner of payment becomes an important issue for young people in terms of their financial dependence. Not only the manner of payment, but also the use of parental means-testing and the setting of rates which presume a degree of parental support, raise similar issues concerning dependency. Youth income support policy has important implications for the relationship between young people and their parents, and the transition from dependency to adulthood.

So, how does the Australian income support system view young people in terms of financial dependence or independence. In a confused manner, is the short answer. Students, if living at home, are seen as financially dependent on parents up to the age of 22 and, if they are secondary students less than 18 years old living at home, they are also now seen as financially irresponsible. Unemployed young people living at home, on the other hand, are treated as financially independent from the age of 21 and always as financially responsible. The income support provisions can also be seen to provide an official interpretation of when it is appropriate for young people to have the option of leaving the parental home. To be paid accordingly, a young unemployed person needs to provide no justification for leaving home from the age of 18, while a student needs to provide justification up to the age of 22.

Why do these differences exist? Is it believed that students' transition to adulthood should be a slower process than that for young people in the workforce? Rather, it seems that the implications for young people's independence take a lower precedence with policy-makers than other considerations in the setting of youth income support entitlements. Besides the anomalies in treatment, a number of commentators have expressed concern at the incremental shift in provisions towards decreasing financial independence for young people on the grounds that it will hinder their development to responsible adulthood, and at the stringency of criteria for Homeless and Independent rates of payment which may force some young people to remain in the parental home when this may well be inappropriate. There has been no response to such criticisms in terms of a coherent view about the relationship between the income support system and young people's transition to independence.

Entitlements to quality

The fourth general potential shortcoming identified here in regard to rights to income support for families, children and young people, concerns the quality of subsidised services and relates specifically to those elements of income support designed to provide assistance with particular costs. In a sense, it is another perspective on the issues of the adequacy and take-up of entitlements.

The extreme case is where someone enjoys an entitlement to a service, but cannot realise that entitlement because of a shortfall in supply. Assistance with the costs of formal child care is a clear example. Despite the considerable growth in the supply of child care places, there are often long waiting lists and the demand for work-related child care places is not expected to be met before 2000–01 (Australian Institute of Health and Welfare 1993, p.133). Similarly, there are long lists of eligible applicants waiting for public rental housing and the income support benefits it entails. In such cases, an entitlement is hollow and can hardly be described as a right. Even where a service is provided, the value of an entitlement can be heavily compromised if it is of poor quality or if access is difficult. A system of free health care is all well and good if services are accessible and if necessary treatment can be received without unreasonable delay.

The provision of Rent Assistance might make housing costs affordable by some measure, but what is the quality of that housing? Is it appropriate for families with children or for young people? Or is it only affordable because of its low quality in terms of location and access to services, or some other facet? This is bringing us back to the question of the adequacy of entitlements: the need to consider what the entitlements mean for the standard of living.

Parental responsibilities

Besides its role in young people's transition to adulthood, parental responsibility plays a vital role in income support for dependent children. While the presence of dependent children is one important trigger for entitlements to income support, the children themselves do not enjoy these rights. Instead, their presence bestows rights upon parents or guardians.

There are thus two links in the mechanism through which income support policy seeks to direct assistance to meet the material needs of young children: a conditional right to income support for parents (guardians); and an implicit responsibility on parents to translate this assistance into benefits for the child. Both links need to be secure if income support entitlements for dependent children are to be effective, though the state does not generally intervene directly in the link of parental responsibility. So, how best to ensure that support for children which is paid to parents does in fact flow on to those children?

At the outset, it should be recognised that the vast majority of parents are more than willing to see income support for dependent children actually benefit their children; indeed, some make arguably undue sacrifices for their children. When they do not, it is believed, this has more to do with constraint than with choice. This points to what is probably the most effective way for the full value of income support to reach children; to ensure that the level of income support for parents is adequate. If such support is not forthcoming, then parents' unmet needs may well impose demands on those components of income support designed for children. This point thus relates back to the issue of adequacy discussed above. Otherwise, an undoubtedly valuable development over recent years has been the increasing direction of income support in respect of dependent children to the primary caregiver in a family. The introduction of Parenting Allowance is a recent example of this development.

Enhancing rights to income support

Rights to income support in Australia are essentially conditional rights. Entitlements are largely dependent on people being in certain identified categories of need, on incomes and assets and, increasingly, on meeting reciprocal obligations. Bearing in mind this qualification to the nature of these rights, three different types of income support rights for young children and young people can be identified. These cover: income support to defray the costs of dependent children; income support for people caring for dependent children; and income support for young people.

A number of issues which may qualify the value of these rights have also been identified and we can focus first on three issues which are common to income support in general. These are: the coverage of assistance; the adequacy of assistance; and the take-up of assistance.

The account of income support programs described a range of programs directed at each of these categories. While the overall impression of broad coverage of these programs is fair, it should also be recognised that there are some gaps in coverage. For example, most recipients of students allowances, unlike their unemployed counterparts, do not enjoy an entitlement to Rent Assistance. If one was able to look in more detail at the programs, some other gaps in coverage would emerge. Clearly, to enhance the value of rights to income support, gaps in coverage, inadequate levels of assistance and shortfalls in the take-up of entitlements need to be continually sought out and addressed.

Certain steps are at present being taken to address some of these matters. There are, for example: moves to simplify the Family Payments system; investigations into benchmarks of adequacy; the attention being paid to the quality of child care; and the work of the National Youth Housing Strategy. Attention to aspects of take-up and quality is particularly noteworthy as it is all too easy to become complacent because an entitlement exists on paper without regard to the issues of take-up and quality. One further step which needs to be added to those already in train is some serious attention to the adequacy of payments for young people. In particular, there appears now to be an opportunity to redress the clear inadequacies which exist with some payments that are explicitly set at low levels because of concerns with work incentives. If there is faith in the strengthened reciprocal obligations, then these should be enough to eliminate undesirable work incentive effects. There is no need for two big sticks. At the same time, to the extent that the age-related structure of payments for young people reflects relativities with an age-related wage system, changes in the wage system away from an age-related basis are a cause for reconsideration.

Apart from the issues of coverage, adequacy and take-up, which apply to income support in general, there are two specific challenges to policy which are peculiar to income support rights for children and

young people. Both revolve around the relationships between three parties: children or young people; parents or guardians; and the state. The first challenge concerns the provision of effective income support to dependent children through the medium of parents. Notwithstanding any concerns about the coverage, adequacy and take-up of payments, this challenge appears to have been largely met.

However, policy has not been equally successful with the second challenge, which concerns the transition from childhood to adulthood and from dependence to independence. The picture of rights and responsibilities which emerges from consideration of income support policy in this area is replete with inconsistencies as should be expected from a seemingly often ad hoc process of policy development. What is overdue here is systematic reform of this area of income support policy, including clear regard to the interactions between income support and young people's transitions to independence, and a clear and consistent basis in rights and responsibilities.

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Index

aboriginal children
  arrest 154, 156, 170
  bail and 165, 166, 167
  police assault on 170
  removal from families 39, 45–6, 49, 50
abortions 206–8, 213
access see custody of children
Additional Family Payment 223–5, 249
  indexation 225
  numbers receiving 224
Adelaide Advertiser 119
Administrative Decisions (Effect of International Instruments) Bill 73
adoption
  and property law 46
  child's right to be heard 47
  concealment of 47, 49
  Convention on Rights of Child and 47
  legislation on 46–7
  of foster children 126
  right to be brought up by parents 49
  right to information on biological parents 47–9, 50–1
advocacy for children 136–8
  necessary features of 137
  provision in states 138
  see also right to be heard
age of consent to medical treatment 186–7, 203, 213
age of eligibility, income support
  Austudy 235–47
  Job Search Allowance 238
  Newstart Allowance 238
  Youth Training Allowance 237
age of majority 186
age of non-dependence 234, 236
Age, *The* 161, 162, 164
Alder, C. 152, 155, 159, 160, 161, 166, 169, 170, 171, 173, 174
Alderson, P. 205
Alston, P. 3
American Anthropological Association 28
Angus, G. 118, 120, 123
Archard, D. 21, 22, 26
Aronson, M. 157, 166, 175
arrest see rights in police custody
assets tests 223, 235, 236
Australia
  deficiencies in children's services 52
  ideologies which have shaped 51–2
Australia and New Zealand Youth Ministers 150, 220, 221
Australian Association for Young People in Care 138
Australian Education Union (AEU) 88
Australian Institute of Health and Welfare 229, 252
Australian Labour Party 231
Australian law and international treaties 40, 41–5
Australian Law Reform Commission 72, 170, 173

Austudy 234, 235–7
  age limits 235–6
  Independent rate 236
  means tests 236
  parental means tests 236
  payment methods 236–7
  rates 235
  Rent Assistance and 245
  Supplement 237

B and B (1988) 70
Baby M inquest 193
bail 164–9
  aborigines 165–6, 167, 170
  bail advocacy 169
  custodial sentences and 168
  detention 165–7
  gender and refusal of 168
  laws regarding 166–7
  NESB young people 167
  on own undertaking 166–7
  refusal of 166–9
Bailey-Harris, R. 167
Baldwin, P. 226, 249
Barber, Justice 60
Barblett, Justice 61
Barker v. South Australia (1978) 98
Barnes, M. 159, 161
Barnes v. Hampshire (UK) 1969 97
Bartell, P. 122
Bartley v. Haines 1989 97
Bath, H. 128, 129
Betrienders 136
Benedict, M. 127
Benjafield, D. 64
Bennett and Bennett (1991) 72
Bentham, J. 14
Berridge, D. 126, 127
Besharov, D. 122, 123
Birkett v. Director General of Family and Community Services 1991 198
Black, Chief Justice 43
Blagg, H. 178
Blanchard, A. 119
Bland's case 195
Bondy, J. 99
Boss, P. 46, 50, 179
Bradley, P. 118, 122
Bradtke, B. 167
Brady, S. 79
Brady, V. 33, 34, 53
Braye, S. 130, 131
Brazier, J. 34
Brennan, D. 116, 125, 127, 132, 136, 139, 140
Brennan, Justice 36, 209
Brewer, G. 41, 48, 160, 165, 179
Britain, J. 79
Bross, D. 137, 138
Brown, D. 176
Brown and Pedersen (1992) 69
Brown v. Nelson 1971 98
Burdekin, B. 40

Carew, R. 125, 141
Carney, T. 115, 139
Carrington, K. 124, 156, 167
Carter, J. 34, 51
Cashmore, J. xiii, 4, 113, 116, 125, 127, 132, 135, 139, 140
Cass, B. 240
Castell-McGregor, S. xiii, 113, 115, 122, 129, 136, 137, 138, 162, 179
Chan, J. 177, 178
Chandler and Depuceg v. McMinnville School District (1992) 103
Chapman and Palmer (1978) 61
Chapman, B. 236, 237
Chapman, J. 88
child abuse 70–1, 74, 118–23
  abuse defined 118–19
  difficulties of counsellors re court procedures 80
  disabled children 121
  ethical problems with reporting 121–3
  further abuse of abused 127, 136
  lack of research on 122
  mandatory reporting 98–9, 117, 120, 202

number of reports of 120
Child Care Act 1972 (Cwlth) 229
Child Disability Allowance 223, 224, 227, 244
Child Support Evaluation Advisory Group 226, 227
Child Support Scheme 226, 248
Childcare Assistance 223, 229–30
Childcare Cash Rebate Scheme 223, 230
Children
adoption of 46–51
age of eligibility, income support 235–7, 238
as asset of society 1, 21
as property of parents 1, 7, 8, 59, 62–3, 114
Australian laws, treatment of 34–8
claiming rights, criteria for 19–20
community attitudes and 35
custody of see entry under custody
'freedom rights' 15–17, 18
fundamental rights of 36–7, 48, 49
income support 9
infringement of rights 45–6
interests of, have priority 45
medical care, right to 16, 18
medical procedures 9, 35, 36, 78–9, 186–214
parents' right to access 68–72
protection and welfare see entry under welfare
registration of 48
resistance to granting rights 3
right to a name 48–50
right to a nationality 48
right to be brought up by parents 49
right to be heard 8, 13, 47, 73, 91, 135
right to know parents 48, 49, 50–1
right to life 48
right to separate representation 8, 56, 72–5, 79
rights in police custody see separate entry
rights of 1–2, 6–7, 11–13, 18–20, 36–7
rights versus parents' powers 35, 91–2, 116–17
self-determination 35–6, 39, 47
self-esteem 7
service provision 4, 52
smoking and 15, 18, 104, 105
testimony of 13
Children Act (UK) 1989 130
Children and Young Persons Act (Vic.) 117–18, 168
Children (Care and Protection) Act 1987 (NSW) 139, 198
'Children of God' case 116–17
Children, representation for
adult required, police questioning 158–60, 177
advocacy 136–8
Betriender 136
Guardian *ad litem* 137
family law matters 72–5, 79
independent voice, welfare 134
lay advocate 137
Ombudsman 136
right to be heard 8, 13, 47, 73, 91, 135–8
right to separate 8, 56, 72–5, 79
states, provisions for advocacy 138
Children, Young Persons and Their Families Act (NZ) 133
Children's Protection Act 1993 (SA) 119, 120, 133, 134
Children's Rights Coalition 41, 52
Chunkin, C. 152
Chisholm, R. 105
Cilento and Cilento (1980) 63
Cleaver, H. 126, 127
Cleland v. R (1982) 158
Coady, M. xiii, 11
common law, international treaties and 44–5
Commonwealth Department of Human Services and Health 40

Commonwealth of Australia 219, 220, 233, 240
Commonwealth v. Tasmania (1983) 42
Commonwealth–State Housing Agreement 233
Community Services Commissioner and the Community Services (Complaints, Appeals, and Monitoring) Act 1993 (NSW) 139
complaints against police 174–8
confidentiality
  and school counsellors 99
  breach of and protection of child 99
  contraceptive advice 35, 204, 207, 213
  right to know parents 48, 49, 50–1
Consent to Medical and Dental Procedures Act 1985 (SA) 187, 204, 205
Consultative Committee on Police Powers of Investigation 162
contraceptive advice 35, 99
Convention on the Rights of the Child xi, 1, 2, 5, 8, 12, 28
  adoption of children and 46–7
  age for military service 29
  child protection under 41, 118
  Commonwealth obligations under 41–52
  corporal punishment 107
  criminal justice and 149–50
  effect on community perceptions 37–8
  family environment and 34
  implementation of 40
  medical procedures for children and 203–213
  policy implications and 51–2
  reporting obligations under 40–1
  right to be heard in proceedings 13, 47, 73, 91, 135–8
  right to education 86, 109
  right to freedom of expression 103
  right to humane treatment 150
  right to life 48
  right to receive information 100
  Western values and 28
corporal punishment 4
  at school 107–8
  parents and 115
corporatist welfare state 216
Cotton and Cotton (1983) 68–9
court proceedings and children 57
  language and conflict 58, 59, 68
  separate representation 8, 56, 72–5, 79
Craig v. Frost 1936 104
Crenshaw, W. 122
Crime (Serious and Repeat Offenders) Act (WA) 38, 162
Crimes Act 1958 (Vic) 157
Crimes (Amendment) Act 1993 (Vic) 162, 164
Criminal Procedure Amendment Act 1994 (WA) 166
cultural practices and abuse 119
cultural relativists 29
Cunneen, C. 156, 167, 169, 170
custody of children
  abuse and 70–1, 74, 80
  access 62, 63, 68–72
  best interests of the child 64
  care and control 61–3
  ex-nuptial children 63, 77, 78
  guardianship 59, 61–3, 78
  homosexual parent 71
  procedures and practices re 79–81
  S 64 checklist 67–8
  separate representation for children 72–5, 79
  welfare of the child 63–8, 69, 76–9
  wishes of the child 65

Dalton v. Skuthorpe 1989 199
de Clifford, N. 179
de Haas, N. 4
De Pantilis, D. 130
Deane, Justice 44, 45, 158, 209
Declaration of the Rights of the Child 12, 16, 28, 42
Denning, Lord 55, 60

dental treatment 232
Department of Employment, Education and Training (DEET) 219, 234, 235, 236, 237, 242
see also Austudy
Department of Social Security 226
Dependent Spouse Rebate 230–1
Dethbridge, Joe 176
Dixon v. Dixon (1976) 57
Dingwall, R. 131
Disability Support Pension 235, 244
discrimination and arrest 156
doctors, defence of necessity 207
Dolby, R. 116, 125, 127, 132, 136, 139, 140
Dolgopol, T. 39
Dolgopol, U. 163, 179
Donaldson, Lord 209, 210, 211
dress codes at school 100–2, 105
Dubowitz, H. 124, 127
Duncan, S. 132
Duquette, D. 136
Dworkin, R. 11

education 2, 8, 84–112
Australian laws 86
choice of schools 90–1
consumer rights in 85
costs of 87
home schooling 94–5
quality of 88–9
responsibility for students 96–8
right to 86, 87
rights in 91–5
school powers 95–111
student involvement in decisions 95
truancy 94
see also Austudy; schools
Education Act 1937 (ACT) 94
Education Act 1994 (Tas) 108, 110
Education Act 1952 (Vic) 104
Education Act Regulations 1960 (WA) 96, 102, 106, 108
Education Amendment Act 1994 (Vic) 89
Education Reform Act 1990 (NSW) 84, 87, 88, 94, 95, 103
Education Regulations 1988 (QLD) 108
Edwards, S. 179
Eekelaar, J. 19, 20, 131
Einteld, Justice 42
Emery, Justice 57
Equal Opportunity Act 1994 (Vic) 102
Escape from Childhood 12
Esping-Andersen, G. 216, 217
Evans v. Ministry of Education 1984 97
ex-nuptial children
adoption of 46
custody of 63, 77
medical procedures 78, 199–200
expulsion from school 109–11
appeals against 111
fair hearings 110
private schools 90, 105

F v. R (1983) 189
Facey, A. 46
families
and rights of members 26
as nurturers of children 34
defects in ideals regarding 34–5
state intervention in 27, 34
'Families First' program 128
Family Court of Australia
jurisdiction of 8
medical procedures and 78–9
welfare jurisdiction 76–9
Family Group Conferences 133
children's views not heard 133–4, 135
'family integrity' 22
family law
communication of 79–81
evolution of 7, 55–8
Family Law Act 1975 (Cwlth) 55, 57, 59, 61, 63–75, 187, 201
S 64 checklist 67–8
wishes of the child and 65
Family Law Amendment Act 1983 61
Family Law Council 61, 72, 73

Family Law Reform Bill 1994 56, 62, 64, 66, 67, 82
Family Law Reform Bill (No 1) 1995 187
Family Payment 223, 225, 248, 249
  Additional Family Payment 224–5, 249
  eligibility 225
  means testing 225
  numbers receiving 224
family preservation schemes 128–30
Farson, R. 12, 15
Faulks, J. xiv, 55
Federation of Community Legal Centres 169, 173, 177
fingerprinting 160–4
  age of children 162–4
  parents' consent 163
  recording of 163
  state law variations 161–4
Finkelhor, D. 122, 123
First World Congress on Children, Law and Rights 3
Flekkoy, M. 139
Fogarty, Justice 98–9, 116, 118, 124, 129
Folbre, N. 21
For the Sake of the Kids 72
Formal Training Assistance 242
foster care
  adoption of foster children 126
  trend towards 124–5
Fraser, Lord 205
Freckleton, I. 149
free speech, right of 15–16
'freedom rights'
  children and 18–20, 29–30
  J.S. Mill and 15, 19
  parents and 20–2
  versus welfare rights 15–17
Freeman, M. 133, 136, 137, 138
Freud, A. 22
Funder, K. xi, xiv, 1

Gaetano v. Christian Brothers [1988] 98
Galanter, M. 149
Gale, F. 156, 167
Gardner, M. 29
Garrick, P. 33
Gelles, R. 129
gender reassignment surgery 212
genital mutilation 119
George, R. 21
Geyer v. Downs (1977) 97
Gillick v. West Norfolk v. Wisbeck Area Health Authority and Department of Health and Social Security [1986] (*Gillick* case) 9, 35, 91, 104, 114, 204, 205, 207, 208
Glendon, M. 14, 24–25
Goddard, C. 125, 141
Golding, W. 93
Goldstein, J. 22
Gray, M. 132
Grimm, B. 141
Guardian *ad litem* 137, 138
Guardian Allowance 223, 224
guardianship
  care and protection orders 123–4
  care by relatives 127
  defined 59
  foster care 124–5, 126
  trend away from residential care 124, 126
  young people leaving care 128
Guardianship Act 1987 (NSW) 20
Guardianship and Administration Board Act 1986 (Vic) 197

H v. W (1995) 62
Haten, B. 29
Haines v. Rytemeister 1986 97
hair styles at school 102
Hancock, L. 159
Harvey, E. 122
Harvey, I. 162, 179
Hassall, I. 135
Henderson Poverty Line 250
Henderson, R. 250
Herring, Chief Justice 64

Higher Education Contribution Scheme (HECS) 237
Hills v. South Australia 1985 98
Hirst, C. 169, 170
Hogg, R. 176
Holdsworth, R. 96
Holland v. Coberoft (1980) 63
Holt, J. 12, 15
Home Child Care Allowance 230, 231
home schooling 94–5
homework 106–7
homosexual parent, and custody of children 71
Housing Assistance Act 1989 233
Hughes, R. 33
Human Rights and Equal Opportunity Act 1986 (Cwlth) 40, 42, 51
Human Rights and Equal Opportunity Commission 116, 156, 169
Human Tissue Act 1982 (Vic) 198
Hunter, J. 157, 166, 175
Hunter v. Johnson 1884 106

income support
  administration of system 247
  age of non-dependent children 234, 236
  appeals 247
  assets tests 223, 235, 236
  Australia as liberal welfare state 216, 217
  Austudy 234, 235–7, 245
  Austudy Supplement 237
  Child Disability Allowance 223, 227, 244
  Child Support Scheme 226, 248
  Childcare Assistance 223, 229–30
  Childcare Cash Rebate Scheme 223, 230
  children's entitlements 222–4
  definition 217
  dental treatment 232
  Dependent Spouse Rebate 230–1
  Disability Support Pension 235, 244
  eligibility for payments 222, 223, 225
  Family Payments 222, 223, 224, 248, 249
  Guardian Allowance 223
  health care card 232
  HECS 237
  Home Child Care Allowance 230, 231
  housing affordability 233
  income tests 223, 235, 236, 237
  Job Compact 240–1
  Job Search Allowance 238, 239
  labour market programs 242
  maintenance payments 226
  Maternity Allowance 228
  means tests 223, 235, 236, 239, 247, 248
  Medicare 231, 244
  Medicare levy 223, 231
  National Training Wage 243
  new-born children, payment to mothers 229
  Newstart Allowance 238
  parental responsibility 252–3
  Parenting Allowances 223, 227–8, 230, 231
  payments, value of 223, 235
  program entitlements 221–2
  public rental housing 233, 252
  'reciprocal obligations' 238, 246
  Rent Assistance 223, 232, 244, 252
  rent rebates 232
  responsibility for 218
  rights to 216, 218–21, 245–55
  Sickness Allowance 244
  Sole Parent Pension 227, 235, 244
  sole parent tax rebate 223
  Special Benefit 243, 244
  students 234–7, 251
  unemployed 237–45, 251
  unemployed, compliance requirements 238
  unemployment allowances 235, 237–40
  wage structure 242–3
  young homeless people 234, 235, 236

young people, payments 235
Youth Disability Supplement 244
Youth Training Allowance 237, 238, 241–2
Youth Training Initiative 241
see also right to income support
Income tax, sole parent rebate 223
income tests 223, 235, 236, 237
identity
Australian 33
right to an 48
'individualist liberalism' defined 24
Industrial Relations Reform Act 1993 243
intellectually disabled children, medical procedures 36, 78, 186, 191–3
International Covenant on Civil and Political Rights (ICCPR) 38, 39, 151
and children 39
and families 39
corporal punishment 107
freedom of expression under 101
redress under 39
International Covenant on Economic, Social and Cultural Rights (ICESCR) 39
Introvigne (1980) 97
IVF technology 48

Jaggar, A. 23
Jaggs, D. 156, 167
James, M. 119
James, S. 178
Job Compact 240–1
Job Search Allowance 238–40
'activity' test 238
conditions 239
JobStart 242
Juvenile Justice Advisory Council 165, 166, 167

K v. Minister for Youth and Community Services [1982] 208
Keating, P. 227, 228, 229, 230, 240, 242
Kids Help Line 121
King, A. xiv, 216, 239
Kioa v. Minister for Immigration and Ethnic Affairs (1985) 42
Kipnis, K. 22
Kirby, Justice 42
'Know Your Rights at School Kit' 93
Koowarta v. Bjelke-Peterson (1982) 42
Kretchman v. Queensland [1989] 98
Krugman, R. 116
Kymlicka, W. 23

L and GM v. MM, The Director-General, Department of Family Services and Aboriginal and Islander Affairs (1994) (*Sarah's case*) 192
Lane, D. 157
language and conflict 58, 59, 68
Lanham, D. 205
Lasch, C. 20
Law Reform Commission of Western Australia 207
lay advocate 137
Lee, Justice 43, 44
legal rights 13–14
liberal welfare state 216
liberalism and individualism 24–6
communitarians 25, 26
'individualist liberalism' 24
rights and responsibilities 25
Lichtenberg, J. 122
Littlemore, S. 179
Lovell v. Lovell (1950) 64
Ludbrook, R. xiv, 84
Luke, G. 167

M and M (1988) 70
M and R v. Palmerston North Boys High School 1990 (NZ) 111
Maas, F. 245
Mabo v. State of Queensland [No. 2] (1992) 44, 53
McDonald, P. 5

McHugh, Justice 209, 211
McMahon v. Bugge 1972 110
Mandatory reporting of abuse or neglect 98–9, 117, 120, 122
Mansell, S. 121
Manson, J. 136
Marchant v. Finney 1992 199
Marion's case see Secretary, Department of Health
Mason, Justice 44, 45, 158
Mason, K. 207
material risk, medical procedures 188–90
Maternity Allowance 228
Mathew, P. 151
Matrimonial Causes Act 1958 (Cwlth) 59, 61, 63, 64–5
means test for income support 223, 225
medical procedures for children
  abortions 206–8, 213
  age of majority 186
  babies and young children 187–90, 193
  blood transfusions 198, 206
  capacity to make decisions 9
  child abuse 202
  child consents, parents refuse 208–9
  child not living with parents 200
  child refuses, parents consent 209–11
  contraceptive advice 35, 204, 207, 213
  doctor's defence of necessity 207
  emergencies 186, 198
  ethics of treatment 211–12
  ex-nuptial children 78, 199–200
  gender re-assignment surgery 212
  genital mutilation 119
  Gillick case 35, 104, 114, 204, 205, 207, 208
  guardians 78, 197, 201
  information to be given to parents 188–90
  intellectually disabled children 36, 78, 186, 191–3
Marion's case 6, 36, 78, 187, 190, 191–3, 204, 209
maternal risk 188–90
Medicare cards and privacy 244
Menhennit Rules 208
mental illness 199, 209–10
NHMRC guidelines 188–90
older children 202–12
order for treatment 197
P v. P 78, 191, 201
parens patriae jurisdiction 78, 197, 202
parents' authority, limitations on 9, 196–212, 244
parents' consent 9, 186, 191, 212
participation in medical research 195–6
refusal of treatment, child 187, 188, 213
refusal of treatment, parent 187–8
right to bodily integrity 25, 36, 123
Sarah's case 192–3
separated parents and consent 187
sterilisation 36, 78, 191–3, 201
treatment (lawful) without parents' consent 198–200
unmarried parents 199–200
withholding of treatment 186, 193–5
Medicare 231, 244
Medicare levy 223, 231
  separate card and privacy 244
Menhennit Rules 208
Mental Health Act 1986 (Vic) 199
military service 28, 29
Mill, J.S. 15, 19, 23, 24, 113
Mill v. South Australia 1980 97
Miller, D. 37
Minister for Foreign Affairs and Trade v. Magno (1992) 42
Ministerial Panel of Inquiry into the Death of Daniel Valerio 117
Minors (Property and Contracts) Act (1970) (NSW) 186–7, 204
Minow, M. 13, 15, 26

Money and Money (1977) 61
moral rights 13–15
Munro v. Anglican Church 1987 97
Murray, T. 131
Murray v. Director of Family Services, ACT (1993) 151

Naffine, N. 160
Nathan, Justice 158
National Centre for Youth Law (US) 141
National Child Protection Council 116, 121, 142
National Children's and Youth Law Centre 109, 152, 153, 178, 179
National Council for the International Year of the Family 116, 228
National Health and Medical Research Council (NHMRC)
  guidelines for medical practitioners 188, 189–90
  guidelines on research on children 196
National Program of Action 40
National Training Wage 243
National Women's Consultative Council 228
National Youth Housing Strategy 245
new-born children, payments to mothers 229
Newstart Allowance 238, 240
  activity agreement 238, 240
Nicholson, Chief Justice 70, 213, 214
Nickel, J. 17–18, 29
NSW Department of Community Services 124
NSW Law Reform Commission 50
Nygh, Justice 68

O'Connor, L. 148, 152, 169, 171, 172, 173, 175, 177
OECD 1
Office of the Commonwealth Ombudsman 226
Official Guardian, as child advocate 137
Okin, S. 23, 26
Olsen, F. 21, 22, 28
Ombudsman, as child advocate 136
Omelczuk, S. 169, 170
O'Neill, O. 15
Ovenden, K. 120

P v. P (1994) 78, 191, 201
Padgen and Padgen (1991) 61
Palmer, A. 158
Parenting Allowances 223, 227–8, 230, 231
parents' rights 20–2
  and incompetent children 6, 35, 36
  as 'fiduciary powers' 36
Parker, S. 3, 11
Parliamentary Committees Act 1968 (Vic) 163
partnerships 130–3
  agency 131–2
  problems with 132–3
  with parents 130
Pateman, C. 23
Payne, T. 239
Perry, J. 246, 249
Pitman, S. 179
police *see* rights in police custody
police, complaints against 174–8
political opinions
  right to express at school 102–3
Polk, K. 179
Pollard v. R (1992) 158, 160
Preston-Shoot, M. 130, 131
Priest v. Priest (1963) 64
private schools 89–90
  anti-discrimination laws apply 90
  corporal punishment 107
  expulsion from 90, 105, 110
  uniforms 101
Probation Officers and Volunteers in Corrections Inc. 168
Progress of Nations, The 107
protection of children *see* welfare and protection of children
'public/private dichotomy' 22–4

R v. Davidson [1969] 208
R v. Heaney [1992] 158
R v. Newport Justices 1929 104
R v. Percerep [1993] 158
R v. S and J (1983) 154
R v. Shaw (1991) 158
R v. Wald (1971) 208
Ramsay v. Larsen (1964) 95
Rawls, J. 27
Ray, P. 137
Rayner, M. xv, 19, 33, 137, 138
Re A (a child) (1993) 212
Re B (a minor) (wardship: medical treatment) [1989] 194, 195
Re C (a minor) (wardship: medical treatment) [1989] 194, 195
Re E (a minor) [1993] 206
Re J (a minor) (wardship: medical treatment) [1990] 194, 195
Re K (1994) 72, 73, 74
  guidelines for independent representation for children 74–5
Re K, W and H (minors) (consent and treatment) [1993] 209
Re L (Infants) [1962] 55
Re Michael (1994) 197, 198
Re P 36
Re R (a minor) (wardship: medical treatment) [1991] 209–10
Re W (a minor) (wardship: medical treatment) [1992] 209, 210–11
Reder, P. 132
registration of children 48
religion in schools 103–4
Rent Assistance 223, 232, 244, 245, 252
  rent rebates 232
reproductive technology and rights of children 46, 47–8, 50–1
Reynolds, H. 33
right to be brought up by own parents 49
right to be heard 8, 13, 47, 73, 91, 135–8
  advocacy 136–8
right to bodily integrity 25, 36, 123
right to income support 216, 218–21, 245–55
  adequacy of entitlements 249–50
  entitlements 248–9, 253–4
  gaps in coverage 254
  parental responsibilities 252–3
  parental support 250–1
  quality of services 252
right to information on biological parents 47, 49, 51
right to life 48
Right to Life Association 194
right to medical care 16
  see also medical procedures for children
rights
  application of 27–30
  attacks on 24–7, 30
  children and 18–20, 25, 29–30
  cultural relativists and 29
  legal 13–14
  moral 13–15, 24
rights in police custody
  abuse by police 169–73, 175
  arrest 152–60, 170
  'assisting police' 153
  at police station 157–60
  bail 164–9
  complaints against police 174–8
  detention in lock-ups 155, 165–7
  fingerprinting 160–4
  force and harm 169–73
  gender and arrest 155, 170
  homeless people 156, 168–9, 170
  practitioners' duties 174–6
  presence of adult required 158–60, 177
  rates of arrest 154–7
  right to silence 157
  separation from adults 165–6
  tape recordings of interviews 157
  unlawfully obtained evidence 158–60, 178
  use of interpreter 157

'rights talk' 1–2, 5, 7, 24–6, 36, 51
Rogers v. Whitaker (1992) 188, 189
Ross, J. 24
Rowlands, Justice 61
Rules for the Protection of Juveniles Deprived of their Liberty 152, 155, 156

S v. P [1962] 68
Sandor, D. xv, 99, 122, 148, 152, 157, 161, 163, 166, 169, 170, 171, 173, 179
Sarah's case see L and GM v. MM
Sawyer, R. 124, 127
Scannapieco, M. 130
Scarman, Lord 204, 211
school leaving age 234
school records, access to 100
school uniforms 100–2, 105
  hair styles 102
schools
  access to records 100
  characteristics of 88
  choice of 90–1
  compulsory attendance 90, 94
  corporal punishment 4, 107–8
  counsellors and confidentiality 99
  detention 108
  discipline in 87, 89
  expulsions 109–11
  fees 90
  home schooling 94–5
  homework 106–7
  injuries at 97
  leaving school 109
  limits on powers over students 104–12
  mandatory reporting of abuse 98–9
  political opinions at 102–3
  powers 95–111
  private 89–90, 101
  religion in 103–4
  student involvement in decisions 95
  supervision in 96–8
  suspensions 109–11
  travel to and from 104–6
  truancy 94
  uniforms 100–2, 105
Scott, D. 128, 129, 132, 142
Scrutiny of Acts and Regulations Committee 164
Secretary, Department of Health and Community Services v. JWB and SMB (1992) (*Marion's case*) 6, 35, 36, 78, 114, 187, 190, 191–3, 204, 209
Selby, H. 149
Seymour, J. 3, 77, 160, 197
Shrimpton v. Hertfordshire (UK) 1911 97
Sickness Allowance 244
Singer, P. 29
Skene, L. xv, 186
Smith v. A.G. Tasmania 1991 97
Sobsey, D. 121
social democratic state 216
Social Policy Research Centre 249
Social Security Act 1991 218, 222, 238, 247
Sole Parent Pension 227, 235, 244
Solnit, A. 22
Solomon, King 59
South Glamorgan County Council v. W and B [1993] 209
Special Benefit 243, 244
Standard Minimum Rules for the Administration of Juvenile Justice 159
Standing Committee on Social Issues 179
statutory law
  international treaties and 41–4
Steinhauer, P. 125, 126
sterilisation 35, 36, 78
Stockwell, C. 179
Stone v. Stone (1945) 64
Student Assistance Act 1973 234
Student Assistance (Youth Training Allowance) Amendment Act 1994 237
students, income support 234, 235–7
  Austudy 234–7

Austudy Supplement 237
'substitute judgement' test 20
Sunday Herald Sun, The 176
suspension from school 109–11
Swain, P. 41, 48, 51, 160, 165, 179
Swain, S. 48, 51
Sweetapple, P. 152, 169, 172, 173
Szwarc, B. 125

T v. Wave (1983) 160
Tait, D. 179
Tanita v. Minister for Immigration [1994] (NZ) 44
Teoh v. Minister for Immigration, Local Government and Ethnic Affairs (1994) (*Teoh* case) 4, 43, 44, 45, 73, 151
Thomas v. South Australia 97
Thompson, I. 137, 138
Tinker v. Des Moines Independent Community School District (1969) 103
Toose, P. 64
travel to school 104–6
Trainnick v. Trainnick (1966) 60

Underwood, R. 169, 170
Unemployment Allowance 235
UNICEF 115
United Nations see Convention on the Rights of the Child; Declaration of the Rights of the Child; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Rules for the Protection of Juveniles Deprived of their Liberty; Standard Minimum Rules for the Administration of Juvenile Justice; Universal Declaration of Human Rights
Universal Declaration of Human Rights 28
Urquiza, A. 125
US Advisory Board on Child Abuse and Neglect 142
Usher Report 132

Valerio (Daniel) case 117
Van Bueren, G. 151
Victorian Council for Civil Liberties 151

Wade, J. 163, 164
Wakeham v. Wakeham [1954] 60
Walker, K. 151
Warner, K. 149, 155, 158, 160, 161
Watson, Professor 119
Watson, R. 64
Watson Report 61
Watson v. Haines 1986 97
Weinberg, M. 157, 166, 175
welfare and protection of children 8, 15, 41, 113–47
abuse, defined 118–19
abuse, number reports of 120
accountability and 138–41
advocacy for children 136–8
age of children in care 124
care and protection orders 123
'Children of God' case 116
child's right to be heard 8, 13, 47, 73, 91, 135
confidentiality 140
corporal punishment 107–8, 115
Daniel Valerio case 117
Family Care Meetings 133, 134–5
Family Group Conferences 133, 135
family preservation schemes 128–30, 133–5
foster care 124–5, 126
genital mutilation 119
Gillick case 9, 35, 91, 104, 114
guardianship orders 123, 125
mandatory reporting 98–9, 117, 120, 122
Marion's case 6, 35, 36, 78, 114
need for independent voice for child 134
neglect defined 118–19
NSW departmental supervision, numbers in 124
parents' autonomy 115–16
partnerships 130–3

'privatisation' of care 124
problems of children in care 125, 127
relatives, care by 127
reporting of abuse 116–23
trends in 128–33
young people leaving care 128
see also child abuse
welfare rights
medical care 16
problems with 17–18
versus freedom rights 15–17
Welfare Rights Centre 246
White, Justice 154
White, R. 152, 159, 161, 169, 170, 174, 176
Wilkie, M. 178
Wilkins, I. 167
Wilkinson, K. 120, 123
Williams, B. 29
Williams v. R (1986) 153
Wilmer, Lord Justice 68
Wilson, K. 239
Winefield, H. 118, 122
World Declaration on the Survival, Protection and Development of Children 40
Wright v. Cheshire 1952 98
Wundersitz, J. 156, 167

Yaman, N. 167
Young Offenders Act 1993 (SA) 165
Young v. Registrar, Court of Appeal and Anor. [No 3] (1993) 42, 151
Youth Advocacy Centre 153, 154, 155, 165, 166, 171, 173
Youth Justice Coalition 152, 156, 167, 169, 173, 174
Youth Law Project (NZ) 101
Youth Training Allowance 237, 238, 241–2
compliance requirements 238
Youth Training Initiative 241

Zabar, P. 118, 120, 123
Zellman, G. 118, 122

The United Nations Convention on the Rights of the Child focuses attention as never before on Australia's moral and legal obligations towards children.

Citizen Child is a thought-provoking review of current Australian law and practice by some of our foremost commentators on children's rights and child policy. The authors face the challenging questions: Can police detain or fingerprint a young child? Can schools enforce dress codes or discipline students for unruly behaviour? What right has an adopted child to knowledge of his or her biological parents? When is a child no longer a "child" under Australian law? How does "rights talk" fit in with notions of love, family, caring and responsibility?

Citizen Child has immediate relevance to professionals providing services for children including teachers, counsellors, family lawyers and mediators, medical practitioners, community and child protection workers, and tertiary students.

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